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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

17 IN RE: HIGH-TECH EMPLOYEE  
18 ANTITRUST LITIGATION  
19 THIS DOCUMENT RELATES TO  
All Actions

**Master Docket No. 11-CV-2509-LHK**

**PLAINTIFFS' CONSOLIDATED  
OPPOSITION TO DEFENDANTS' JOINT  
AND INDIVIDUAL MOTIONS FOR  
SUMMARY JUDGMENT**

Date: March 20 and 27, 2014  
Time: 1:30 pm  
Courtroom: 8, 4th Floor  
Judge: Honorable Lucy H. Koh

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21	Deposition of Ed Catmull (January 24, 2013) .....	Catmull __
22	Deposition of Alan Eustace (February 27, 2013) .....	Eustace __
23	Deposition of Patrick Flynn (April 3, 2013) .....	Flynn __
24	Deposition of Arnon Geshuri (August 17, 2012).....	Geshuri __

<sup>1</sup> The depositions of witnesses who provided a report and a deposition are abbreviated as “[Last Name] Dep.”; the deposition of witnesses who provided a deposition but not a report are abbreviated as “[Last Name].” Deposition transcripts and exhibits are attached to the accompanying Declaration of Lisa J. Cisneros In Support of Plaintiffs’ Opposition Briefs. All other documents are attached to the accompanying Declaration of Dean M. Harvey In Support of Plaintiffs’ Opposition Briefs.

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17           **C.     Defendants' Expert Witnesses**

18	Deposition of Kevin Murphy (Vol. I., pp. 1-385, December 3, 2012, Vol. II, pp. 386-568, July 5, 2013 and Vol III. December 7, 2013 pp.569-901) ...	Murphy Dep.
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6	Supplemental Reply Expert Report of Edward E. Leamer, Ph.D. (July 12, 2013) .....	Leamer IV ¶
7	Merits Expert Report of Alan Manning (October 28, 2013).....	Manning ¶
8	Merits Expert Report of Matthew Marx (October 28, 2013).....	Marx ¶
9	Merits Rebuttal Expert Report of Matthew Marx (December 11, 2013).....	Marx Rebuttal ¶

10           **B.       Defendants' Experts**

11	Merits Expert Report of David Lewin (November 25, 2013).....	Lewin ¶
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14	Merits Expert Report of Lauren Stiroh (November 25, 2013).....	Stiroh ¶
15	Merits Expert Report of Eric Talley (November 25, 2013).....	Talley ¶

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1      **I.      INTRODUCTION**

2      This is the *fourth* time Defendants have asked the Court to accept the far-fetched premise  
3      that their misconduct amounts to “nothing more” than “parallel behavior among pairs of  
4      Defendants.” Oct. 13, 2011 Joint Mot. to Dismiss the Consol. Am. Compl. (Dkt. 79), at 13-14.  
5      *See also* Nov. 12, 2012 Opp’n to Pls.’ Mot. for Class Cert. (Dkt. 209), at 1-8; June 21, 2014  
6      Opp’n to Pls.’ Supp. Mot. for Class Cert. (Dkt. 439), at 3-4, 19-21. The Court should reject  
7      Defendants’ fourth attempt for the same reasons the Court rejected their prior three.<sup>2</sup>

8      Defendants’ four individual motions for summary judgment serve a single purpose: to  
9      contest the sufficiency of the substantial evidence as to each Defendant’s participation in the  
10     alleged conspiracy. Defendants’ joint motion for summary judgment is nothing more than a  
11     vehicle for Defendants to refer to their separate motions to exclude Dr. Edward E. Leamer’s  
12     testimony. Joint MSJ at 1. Defendants’ strategy disregards the Court’s clear instructions. The  
13     Court directed Defendants to brief common issues, such as the applicable legal standard (rule of  
14     reason versus per se), in a joint brief, and to spend as little time as possible contesting the  
15     sufficiency of the evidence, given the “very rich, rich record.” May 15, 2013 Case Mgmt. Conf.  
16     Tr., at 7:19-20. *See also id.* at 7:15-17 (“I’m quite familiar with the facts in this case after the  
17     motion to dismiss and the class cert. I don’t think this is a summary judgment case.”), 8:19-21 (“I  
18     think there’s abundant evidence that there was an overall[,] overarching conspiracy sufficient to  
19     go to trial at least.”), 13:17-18 (“The rule of reason versus per se, that obviously should be  
20     briefed, and we haven’t really done that yet.”); 15:4-7 (Defendants’ joint brief “will be the rule of  
21     reason versus per se. On sufficiency of the evidence, I just think that’s going to be hard to win on  
22     summary judgment.”); Apr. 8, 2013 Case Mgmt. Conf. Tr., at 15:18-23 (“just based upon the  
23     fullness of the evidentiary record . . . it may be that we just skip summary judgment completely.  
24     The record is too rich.”).<sup>3</sup>

25      

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26      <sup>2</sup> *See In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1115-1123 (N.D. Cal. 2012)  
27      (“High-Tech I”); *In re High-Tech Emp. Antitrust Litig.*, 289 F.R.D. 555, 564-65, 570-73 (N.D.  
28      Cal. 2013) (“High-Tech II”); *In re High-Tech Emp. Antitrust Litig.*, No. 11-2509-LHK, 2013 U.S.  
Dist. LEXIS 153752, at \*56-110 (N.D. Cal. Oct. 24, 2013) (“High-Tech III”).

29      <sup>3</sup> Defendants’ three joint motions to exclude expert testimony also violate the Court’s  
30      instructions. The December 18, 2013 Case Mgmt. Order restricted Defendants to a total of 25

Footnote continued on next page

Setting aside what they fail to address, Defendants' five motions for summary judgment are notable for what they admit. First, Defendants concede the bilateral anti-solicitation agreements as alleged. Second, Defendants do not meaningfully contest the existence of the alleged conspiracy. Instead, each claims not to have joined it. Third, Defendants concede that their alleged misconduct violated the antitrust laws per se. Despite the Court's instructions, the phrases "per se" or "rule of reason" appear nowhere in their motions. Defendants have thus finally confirmed what has long been obvious: the Antitrust Division of the United States Department of Justice understood the facts and properly applied the antitrust laws when it found Defendants' agreements to be "per se unlawful" and "facially anticompetitive because they eliminated a significant form of competition to attract high-tech employees, and, overall, substantially diminished competition to the detriment of the affected employees who were likely deprived of competitively important information and access to better job opportunities."<sup>4</sup> "Defendants' concerted behavior both reduced their ability to compete for employees and disrupted the normal price-setting mechanisms that apply in the labor setting."<sup>5</sup> With respect to the alleged conspiracy as a whole, Defendants advance no justification whatsoever. The instructions to the jury at trial will accordingly be limited to the per se standard.<sup>6</sup>

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*Footnote continued from previous page*

pages (Dkt. 547 at 2), but Defendants filed three motions that total 35 pages. *See* May 15, 2013 Case Mgmt. Conf. Tr., at 28:13-18 ("I want to strongly encourage you to restrict these [*Daubert* motions] further and—and the reason is that, you know, most likely, things are going to weight and not admissibility. *Daubert*, you know, the likelihood that somebody would be struck completely, probably not likely."); Apr. 8, 2013 Case Mgmt. Conf. Tr., at 12:22-13:5 ("If the *Daubert* motions are like the *Daubert* motions I saw on the class cert. motion, I'm going to be disappointed because, you know, ultimately that's really weight and not admissibility and the criticisms that each side raised are really more for cross-examination and for closing argument. So I really—I just don't want to have to, you know, spend a ton of resources just having to do a bunch of those because those are not going to be granted."). Plaintiffs have accordingly moved separately to enforce the Court's Case Management Order regarding page limits.

<sup>4</sup> DOJ Competitive Impact Statement at 3, *United States v. Adobe Systems Inc., et al.*, No. 10-cv-1629-RBW (D.D.C. Sept. 24, 2010) (regarding agreements among all defendants but Lucasfilm), attached as Ex. 168 to Cisneros Decl. *See also* DOJ Competitive Impact Statement at 8, *United States v. Lucasfilm LTD.*, No. 10-cv-2220-RBW (D.D.C. Dec. 21, 2010) (regarding agreement between Lucasfilm and Pixar), attached as Ex. 167 to Cisneros Decl.

<sup>5</sup> DOJ Competitive Impact Statement at 10, *United States v. Adobe Systems Inc., et al.*, *supra*. *See also* DOJ Competitive Impact Statement at 8, *United States v. Lucasfilm LTD.*, *supra*.

<sup>6</sup> Defendants cannot remedy their failure to address this issue in reply. "This Court 'need not consider arguments raised for the first time in a reply brief.'" *Zamani v. Carnes*, 491 F.3d 990,

*Footnote continued on next page*

1           Thus the only contested issue is one the Court has already resolved: whether there is  
2 sufficient evidence of ““a unity of purpose[,] a common design and understanding, or a meeting  
3 of minds in an unlawful arrangement”” to take the case to trial. *High-Tech I*, 856 F. Supp. 2d at  
4 1117 (quoting *Monsanto Co. v. Spray Rite Svc. Corp.*, 465 U.S. 752, 764 (1984)). Two years  
5 ago, the Court held that “Plaintiffs have alleged facts beyond mere parallel conduct that ‘tend[] to  
6 exclude the possibility of independent action.’” *Id.* (quoting *Monsanto*, 465 U.S. at 764). The  
7 Court rightly observed that Plaintiffs will be entitled to relief if they prove the factual allegations  
8 in the Consolidated Amended Complaint (“CAC”). Plaintiffs have now presented the Court with  
9 voluminous direct and circumstantial evidence verifying these allegations. Further, after  
10 discovery, the “record is so much richer than that.” May 15, 2013 Case Mgmt. Conf. Tr., at 8:16-  
11 17. There can be no question that this evidence is, at the very least, sufficient to create genuine  
12 disputes of material fact regarding Defendants’ participation in a conspiracy to suppress  
13 employee compensation and mobility. *See Part II, infra.*

14           In Part III, Plaintiffs review the applicable legal standards regarding summary judgment  
15 and conspiracy. Defendants’ authorities, such as *Matsushita Elec. Indus. Co., Ltd. v. Zenith*  
16 *Radio Corp.*, 475 U.S. 574 (1986) and *In re Citric Acid Litig.*, 191 F.3d 1090 (9th Cir. Cal. 1999),  
17 in fact explain why summary judgment would be improper here. These cases address situations  
18 where: (1) Plaintiffs rely exclusively on circumstantial evidence of a violation; and (2) the  
19 underlying challenged conduct, but for conspiracy, would be the “very essence of competition,”  
20 such as cutting prices to consumers for decades with no evidence of anticompetitive effects.  
21 *Matsushita*, 475 U.S. at 594. In such circumstances, courts should be careful about inferring a  
22 conspiracy, based on circumstantial evidence, from otherwise pro-competitive conduct: “mistaken  
23 inferences . . . are especially costly, because they chill the very conduct the antitrust laws were  
24 designed to protect.” *Id.* This concern has no place here, where Plaintiffs rely on substantial

25 *Footnote continued from previous page*

26 997 (9th Cir. 2007). *See also Holmes v. Elec. Document Processing, Inc.*, No. 12-CV-06193-  
27 LHK, 2013 U.S. Dist. LEXIS 116598, at \*22-23 n.4 (N.D. Cal. Aug. 15, 2013) (Koh, J.) (“It is  
28 well settled that new arguments cannot be made for the first time in reply. This goes for new facts  
too.’ Thus, the Court declines to consider these arguments.”) (quoting *Gold v. Wolpert*, 876 F.2d  
1327, 1331 n.6 (7th Cir. 1989)).

1 direct evidence of unlawful agreements, and where the underlying conduct is not the “very  
2 essence of competition,” but rather a network of collusive, secret agreements to suppress  
3 employee compensation and mobility that are themselves per se violations of the antitrust laws  
4 (and all of which Defendants concede occurred).

5 Even if the Court applies the burden-shifting framework of *Citric Acid*, summary  
6 judgment should be denied because Defendants cannot carry their initial burden of showing: (1) a  
7 plausible alternative explanation for their alleged conspiracy; and (2) that their alleged conspiracy  
8 was otherwise pro-competitive. In attempting to construct after-the-fact justifications for their  
9 anti-solicitation agreements, Defendants all violate controlling authority: “In antitrust conspiracy  
10 cases, ‘plaintiffs should be given the full benefit of their proof without tightly compartmentalizing  
11 the various factual components and wiping the slate clean after scrutiny of each . . . [T]he  
12 character and effect of a conspiracy are not to be judged by dismembering it and viewing its  
13 separate parts, but only by looking at it as a whole . . .’” *High-Tech I*, 856 F. Supp. 2d at 1118  
14 (quoting *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)).  
15 Defendants fail to provide any plausible alternative explanation for how their network of nearly  
16 identical, secret agreements arose and operated concurrently for five years, without any  
17 coordination or communication among them. And, of course, the evidence shows Defendants did  
18 in fact communicate and coordinate through the close relationships and overlapping roles of their  
19 CEOs and other senior executives. Each Defendant entered into at least one secret anti-  
20 solicitation agreement, and each Defendant gained knowledge of the “essential nature of the  
21 plan<sup>7</sup>: to suppress employee compensation and mobility through a network of anti-solicitation  
22 agreements that extended beyond their own bilateral agreements.

23 Defendants’ motions for summary judgment should be denied.

24 **II. THE RICH EVIDENTIARY RECORD DEMONSTRATES THE ALLEGED**  
**CONSPIRACY AND EACH DEFENDANTS’ PARTICIPATION IN IT**

26 In denying Defendants’ Joint Motion to Dismiss, the Court held that “Plaintiffs describe a

27 \_\_\_\_\_  
28 <sup>7</sup> ABA Section of Antitrust Law, Model Jury Instructions in Civil Antitrust Cases (2005 ed.), at  
B-13 (“Jury Instructions”).

1 plausible scenario as to how, in light of basic economic principles, these agreements formed an  
2 overarching conspiracy that resulted in artificially lower salaries.” *High-Tech I*, 856 F. Supp. 2d  
3 at 1117. First, “it is plausible to infer that even a single bilateral agreement would have the ripple  
4 effect of depressing the mobility and compensation of employees of companies that are not direct  
5 parties to the agreement.” *Id.* at 1121. “Plaintiffs’ allegations of six parallel bilateral agreements  
6 render the inference of an anticompetitive ripple effect that much more plausible.” *Id.* Second,  
7 the agreements are alleged to have been “negotiated, executed, and, in most cases, enforced by  
8 Defendants’ senior executives,” and all of the express agreements involved Mr. Jobs or another  
9 member of Apple’s Board of Directors. *Id.* at 1116 (internal quotation omitted). Third, “the  
10 identical nature of the six bilateral agreements may support the inference that these individuals  
11 played a role in shaping these agreements.” *Id.* In fact, it “strains credulity” to argue that the  
12 alleged identical, secret agreements could be reached “without some communication or  
13 coordination” among Defendants. *Id.* Fourth, Defendants had an “opportunity to conspire” based  
14 upon overlapping boards and other frequent contacts among Defendants’ senior executives. *Id.* at  
15 1118-20. Fifth, the “plausibility of these inferences increases when the Court considers that Mr.  
16 Jobs exerted significant influence over companies involved in four of the bilateral ‘Do Not Cold  
17 Call’ agreements: Pixar-Lucasfilm; Apple-Pixar; Apple-Google; and Apple-Adobe.” *Id.* at 1119.  
18 The allegations regarding Mr. Jobs’s personal involvement, including his communications, show  
19 that “it is reasonable to infer that Mr. Jobs had the intent to reduce competition for skilled labor  
20 and was aware that ‘Do Not Call Agreements’ were effective means of doing so.” *Id.* “[I]t is also  
21 reasonable to infer that the overlapping board memberships provided an opportunity for Mr. Jobs  
22 to expand the conspiracy.” *Id.*

23 When viewing these factual allegations as “a whole,” *id.* at 1118 (quoting *Cont’l Ore*, 370  
24 U.S. at 699), the Court concluded that “Plaintiffs here have alleged facts plausibly suggesting ‘a  
25 unity of purpose[,] a common design and understanding, or a meeting of minds in an unlawful  
26 arrangement.’” *Id.* at 1120 (quoting *Monsanto*, 465 U.S. at 764). The Court also found that  
27 “Plaintiffs have alleged facts beyond mere parallel conduct that ‘tend[] to exclude the possibility  
28 of independent action.’” *Id.* (quoting *Monsanto*, 465 U.S. at 764).

1           The parties have now completed discovery, and the evidence confirms Plaintiffs'  
2 allegations. The conspiracy indeed "began with an agreement between senior executives of Pixar  
3 and Lucasfilm to eliminate competition between them for skilled labor, with the intent and effect  
4 of suppressing the competition and mobility of their employees." CAC ¶ 56. The "senior  
5 executives" were George Lucas (former Chairman and CEO of Lucasfilm), Mr. Jobs (former  
6 CEO of Pixar and Apple), and Ed Catmull (who ran Pixar under Mr. Jobs's close supervision, and  
7 who is the current President of Walt Disney and Pixar Animation Studios<sup>8</sup>). On January 30,  
8 1986, Mr. Lucas sold Lucasfilm's "computer division," a "tech, research, and development  
9 company" to Mr. Jobs, which became "Pixar." Lucas 16:15-17, 59:9; Catmull 78:22-79:16;  
10 PIX00087434 (Purchase Agreement). Shortly after the sale of Pixar,<sup>9</sup> and continuing until the  
11 DOJ investigation in 2009, Lucasfilm and Pixar employees were [REDACTED]

12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED] Direct  
15 evidence confirms that the illicit agreement between Pixar and Lucasfilm occurred as Plaintiffs  
16 allege.<sup>10</sup>

17           Mr. Lucas and Mr. Catmull both admitted that their anti-solicitation agreement had "the  
18 intent and effect of suppressing the compensation and mobility of their employees." CAC ¶ 56.

19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED] Lucas 44:18-25. Mr. Lucas  
24 agreed with Mr. Catmull that Pixar would reciprocate this "rule." Anti-solicitation agreements  
25

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26           <sup>8</sup> See <http://waltdisneystudios.com/corp/unit/6/bio/53>.

27           <sup>9</sup> [REDACTED]

28           <sup>10</sup> Compare CAC ¶¶ 58-64 with Exs. 129, 131, 137, 154, 158, 164, 695, 947; Lucas 67:12-15,  
92:12-13, 96:19-25; J. Morris 126:20-127:10, 165:13-16; PIX00004051; LUCAS00013507.

1 matter particularly in the case of new or growing competitors, who would otherwise [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]

14 Mr. Catmull admitted that anti-solicitation agreements suppress employee compensation  
15 systematically, by design. Without them, growing companies [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]

24 [REDACTED].<sup>11</sup>

25 <sup>11</sup> Though they try, the remaining Defendants cannot distance themselves from these revealing  
admissions. Defense counsel conceded that these admissions are relevant to the non-settling  
26 Defendants as alleged co-conspirators. Aug. 8, 2013 Tr. 17:24-18:14. Indeed, it is black letter  
conspiracy law that “the acts and statements of the conspirators are binding on all those whom  
27 [the jury] finds were members of the conspiracy.” Jury Instructions at B-14 (citing, in part,  
*United States v. United Gypsum Co.*, 333 U.S. 364, 393 (1948) (“the declarations and acts of the  
various [conspirators], even though made or done prior to the adherence of some to the

Footnote continued on next page

1           Mr. Catmull testified that he kept Mr. Jobs fully informed of the existence, intent, and  
2 effect of Pixar's anti-solicitation agreement with Lucasfilm. [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]

7 [REDACTED] Direct evidence shows that this agreement occurred as Plaintiffs allege.<sup>12</sup>

8           Mr. Jobs expanded the conspiracy aggressively, making clear that the anti-solicitation  
9 agreements he demanded were not aberrant one-offs, but instead reflected a wider scheme to  
10 eliminate competition for technical talent. Mr. Jobs—renowned as one of the great visionaries of  
11 the tech [REDACTED]

12 [REDACTED] Schmidt 169:20-23.<sup>13</sup> Mr. Schmidt admitted that, given his knowledge of Mr. Jobs's  
13 "view," it was [REDACTED]

14 [REDACTED] Schmidt 169:4-170:20 (emphasis added). [REDACTED]

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]

20 [REDACTED] Brin 112:21-24.

21           It is no coincidence that every express agreement at issue in this case involved Mr. Jobs

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22 *Footnote continued from previous page*

23 conspiracy, become admissible against all as declarations or acts of co-conspirators in aid of the  
conspiracy").

24 <sup>12</sup> Compare CAC ¶¶ 85-91 with Exs. 139, 162, 369, 420, 424; Zissimos 128:20-23.

25 <sup>13</sup> [REDACTED] n writing the  
26 book, Mr. Isaacson interviewed dozens of witnesses, including key figures in this case: Mr.  
Campbell, Mr. Catmull, Mr. Cook, Mr. Otellini, and Mr. Schmidt. Walter Isaacson, *Steve Jobs*  
27 575-76 (2011). Mr. Jobs "kept a tight rein on the hiring process." *Id.* at 142. He "acted as if he  
28 were not subject to the strictures around him," and had a "Nietzschean attitude that ordinary rules  
didn't apply to him." *Id.* at 119, 313. Those ordinary rules apparently included the antitrust laws.

1 directly, and/or involved Bill Campbell, a long-time (and current) Apple Director and Mr. Jobs's  
2 [REDACTED] Campbell 20:1-3. Mr. Campbell's relationship with Mr. Jobs  
3 dates back to April 1983 when Mr. Jobs interviewed him for a position at Apple. Campbell  
4 17:25-18:4. Mr. Jobs and Mr. Campbell were also neighbors in Palo Alto and spoke to each other  
5 several times a week. Campbell 20:6-18. This relationship proved critical in expanding the  
6 conspiracy to the remaining Defendants.

7 In June 2004, Google determined that it needed to [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED] Ex. 872.

17 Instead of retaining Apple employees by increasing their compensation, Mr. Jobs sought  
18 to eliminate the competitive threat altogether. [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 [REDACTED] Apple's head of Human Resources, Danielle Lambert, announced the reciprocal  
2 deal to Apple recruiters: [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]

8 [REDACTED] Additional direct evidence provides support that the agreement  
9 between Apple and Google occurred just as Plaintiffs allege.<sup>14</sup>

10 Only three months after Mr. Jobs convinced Google to eliminate [REDACTED]  
11 Ex. 557, he persuaded Adobe's CEO, Bruce Chizen, to enter an identical agreement, largely by  
12 threatening to have Apple solicit [REDACTED] Ex.  
13 223. Knowledge of the Adobe/Apple agreement spread to other Defendants as the conspiracy  
14 continued. [REDACTED]

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED] Flynn 56:6-  
19 25. Additional direct evidence provides further support that the agreement between Adobe and  
20 Apple occurred as Plaintiffs allege.<sup>15</sup>

21 Google's agreement with Intel arose as part of the same common understanding and  
22 course of conduct. [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

26 <sup>14</sup> Compare CAC ¶¶ 79-84 with Exs. 179, 180, 181, 187, 192, 199, 250, 276, 277, 563, 653, 1871;  
27 Bentley 13:7-14:7, 36:12-17; Flynn 110:18-112:23; Geshuri 161:2-167:8, 172:6-8; Schmidt  
60:21-22, 97:11-102:8; GOOG-HIGH TECH-00007574.

28 <sup>15</sup> Compare CAC ¶¶ 72-78 with Exs. 223, 225, 226, 679; Bentley 39:25-40:3.

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED] Additional direct evidence  
8 provides further support that the agreement occurred as Plaintiffs allege.<sup>16</sup>

9 Finally, after Mr. Campbell succeeded in bringing Google into the fold, Mr. Campbell  
10 [REDACTED] Ex. 597. Google agreed to

11 Mr. Campbell's request. Ex. 597; Campbell 28:23-29:1 [REDACTED]

12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 Campbell 30:16-22. Direct evidence provides support that the agreement occurred as Plaintiffs  
19 allege.<sup>17</sup>

20 Failed attempts to expand the conspiracy to additional companies provide yet more  
21 support. As the Court explained in denying Defendants' Joint Motion to Dismiss, the alleged  
22 communications between Mr. Jobs and the then CEO of Palm, Ed Colligan, create a reasonable  
23 inference that "Mr. Jobs had the intent to reduce competition for skilled labor and was aware that  
24 'Do Not Cold Call' agreements were effective means of doing so." *High-Tech I*, 856 F. Supp. 2d  
25 at 1119. Those communications in fact occurred exactly as Plaintiffs allege, and Mr. Colligan

26 <sup>16</sup> Compare CAC ¶¶ 97-102 with Exs. 182, 200, 201, 202, 387, 459, 460, 1869; Otellini 46:9-17;  
27 76526DOC000007; GOOG-HIGH TECH-00056879.

28 <sup>17</sup> Compare CAC ¶¶ 103-107 with Exs. 196, 197, 597; Campbell 28:23-29:1, 30:16-22, S. Brown  
204:13-205:11; GOOG-HIGH TECH-00057458; GOOG-HIGH TECH-00058235.

1 himself provided Plaintiffs with a declaration providing yet further support. *Compare CAC ¶¶ 92-*  
2 *96 with Colligan Decl. ¶¶ 1-8, Exs. A and B.*<sup>18</sup>

3 Thus the alleged facts that the Court earlier found “tend[] to exclude the possibility of  
4 independent action” and “plausibly suggest[] ‘a unity of purpose[,] a common design and  
5 understanding, or a meeting of the minds in an unlawful arrangement,’ have now been  
6 established with voluminous direct and circumstantial evidence. *High-Tech I*, 856 F. Supp. 2d at  
7 1117 and 1120 (quoting *Monsanto*, 465 U.S. at 764). *See also id.* (quoting *Harkins Amusement*  
8 *Enters., Inc. v. Gen. Cinema Corp.*, 850 F.2d 477, 484 (9th Cir. 1988) (“concerted action may be  
9 inferred from circumstantial evidence of the defendant’s conduct and course of dealings”)  
10 (internal citation omitted)).

11 Since the Court denied Defendants’ joint motion to dismiss, discovery has provided a  
12 record that is “so much richer” than the facts alleged in the CAC. May 15, 2013 Case Mgmt.  
13 Conf. Tr., at 8:16-17. For brevity, Plaintiffs respectfully refer the Court to its own detailed  
14 summaries of this evidence in its two orders regarding Plaintiffs’ original and supplemental  
15 motions for class certification. *High-Tech II*, 289 F.R.D. at 564-65, 570-573; *High-Tech III*, 2013  
16 U.S. Dist. LEXIS 153752, at \*55-110.

17 In addition to substantial documentary and testimonial evidence, Plaintiffs also provide  
18 extensive expert analysis. First, Dr. Edward E. Leamer estimates the damages caused by  
19 Defendants’ conspiracy, applying the same methodology the Court examined carefully in  
20 connection with class certification. Leamer Merits ¶¶ 16-46. Dr. Leamer is the Chauncery J.  
21 Medberry Professor of Management, Professor of Economics, and Professor of Statistics at the  
22 University of California at Los Angeles. He finds that Defendants accomplished their objective:  
23 as a result of their conspiracy, Defendants suppressed total class compensation by 9.3% during  
24 the conspiracy period. Leamer Merits, Figures 6 and 7. In addition, Dr. Leamer attaches and  
25 resubmits his prior four expert reports that were prepared earlier in connection with class  
26 certification. Leamer Merits ¶ 1, Exs. A-D. In those reports, Dr. Leamer examines the evidence

27  
28 <sup>18</sup> Mr. Jobs also attempted to conclude a similar illegal agreement with Ed Zander, CEO of  
Motorola. Exs. 272, 1024, 1026, 2788.

1 and finds that the purpose and effect of Defendants' conspiracy was to suppress Class  
2 compensation and mobility. Leamer I ¶¶ 13-52, 57-62, 81-88, 107-125; Leamer II ¶¶ 10-40, 50-  
3 56; Leamer IV ¶¶ 18-25. Dr. Leamer applies economic theory that explains how the anti-  
4 solicitation agreements succeeded in their objective. Leamer I ¶¶ 66-80; Leamer II ¶¶ 49; Leamer  
5 IV ¶¶ 20-25. Finally, Dr. Leamer provides Class-wide methods of showing anticompetitive  
6 impact and estimating damages, and showing that all or nearly all Class members were injured.  
7 Leamer I ¶¶ 89-106, 126-148; Leamer II ¶¶ 41-48, 57-109; Leamer III ¶¶ 14-68; Leamer IV  
8 ¶¶ 26-67. Dr. Leamer also provided over 30 hours of deposition testimony, covering these and  
9 other related topics. Defendants move to exclude his damages analysis only, conceding the  
10 admissibility of his remaining opinions.<sup>19</sup>

11 Second, Dr. Kevin F. Hallock is the Donald C. Opatrny '74 Chair of the Department of  
12 Economics, the Joseph R. Rich '80 Professor, Professor of Economics and Human Resource  
13 Studies, and Director of the Institute for Compensation Studies at Cornell University.<sup>20</sup>  
14 Dr. Hallock conducts a detailed assessment of Defendants' testimony and contemporaneous  
15 business records and finds: (1) all Defendants had formal administrative pay systems, including  
16 using market surveys, Hallock ¶¶ 10-97, 196-200; (2) all Defendants worked to preserve internal  
17 pay equity among their employees, ¶¶ 98-169; (3) pay moved in Defendant firms in systematic  
18 and structured ways, ¶¶ 189-195, 201-216; (4) internal equity is consistent with pay for  
19 performance, ¶¶ 170-179; and (5) anti-solicitation agreements had clear impacts on employee  
20 compensation, and accordingly he predicts that pay suppression spread to all or nearly all Class  
21 members, ¶¶ 180-239. Defendants have not challenged any aspect of Dr. Hallock's testimony.

22 Third, Dr. Alan Manning is one of the world's leading authorities on labor markets and  
23

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24 <sup>19</sup> Despite the Court's prior rulings, Defendants spend 25 pages attacking Dr. Leamer's damages  
methodology. Plaintiffs respond to these arguments separately.

25 <sup>20</sup> Since submitting an earlier analysis in support of Plaintiffs' Supplemental Motion for Class  
Certification, Dr. Hallock received Princeton University's Richard A. Lester Award for the  
26 Outstanding Book in Industrial Relations, for his book *Pay*, on which much of his analysis in this  
case is based. "The award is presented to the book making the most original and important  
27 contribution toward understanding the problems of industrial relations, and the evolution of labor  
markets." [http://www.irs.princeton.edu/richard-lester-award-outstanding-book-industrial-](http://www.irs.princeton.edu/richard-lester-award-outstanding-book-industrial-relations-and-labor-economics)  
28 [relations-and-labor-economics](http://www.irs.princeton.edu/richard-lester-award-outstanding-book-industrial-relations-and-labor-economics).

1 employer market power. He is a Professor of Economics at the London School of Economics,  
2 and served as Chair of its Department of Economics from 2009-2012. He is the author of a  
3 leading book on the subject of employer market power, *Monopsony in Motion: Imperfect*  
4 *Competition in Labor Markets*, published by Princeton University Press, and author of the chapter  
5 “Imperfect Competition in Labor Markets” in the Handbook of Labor Economics. Manning, Ex.  
6 A. Dr. Manning applies his expertise to the facts and finds: (1) knowledge of job opportunities  
7 play a central role in determining compensation, ¶¶ 17-26; (2) labor markets are imperfectly  
8 competitive and do not behave in the way Defendants’ experts presuppose, ¶¶ 27-45, 52-56;  
9 (3) Defendants’ conspiracy is likely to have had a large effect on Class members’ job  
10 opportunities and the quality of information available to the Class, ¶¶ 11-16, 46-51, 57-73; and  
11 (4) Dr. Leamer’s analyses are consistent with Dr. Manning’s conclusions and observations, and  
12 Dr. Leamer’s damages estimate “is an appropriate approach to measuring the impact of the  
13 conspiracy on worker compensation,” ¶ 74. Defendants concede the admissibility of  
14 Dr. Manning’s opinions.

15 Fourth, Dr. Matthew Marx is Associate Professor of Technological Innovation,  
16 Entrepreneurship, and Strategic Management at the Massachusetts Institute of Technology Sloan  
17 School of Management. He is an expert on the topic of employee non-compete agreements, has  
18 published empirical studies in prominent peer-reviewed journals investigating the impact of non-  
19 compete agreements,<sup>21</sup> and has twice provided testimony on the topic to the Massachusetts Joint  
20 Committee on Labor and Workforce Development. Marx, Ex. 1. Prior to his academic career,  
21 Dr. Marx spent a decade working at technology companies, including in Silicon Valley, where he  
22 obtained 7 U.S. Patents, wrote thousands of lines of computer code, led engineering teams of up  
23 to 75 technology workers, and oversaw extensive collaborations with other companies. *Id.*  
24 Dr. Marx applies his expertise to the evidentiary record and investigates: (1) the likely impact of  
25 Defendants’ conspiracy on Class compensation; and (2) Defendants’ alternative explanation that  
26 their anti-solicitation agreements were created to facilitate technological collaborations and other

27 <sup>21</sup> See, e.g., Matthew Marx, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of*  
28 *Technical Professionals*, 76 Am. Soc. Rev. 695 (2011); Matthew Marx, et al., *Mobility, Skills,*  
*and the Michigan Non-Compete Experiment*, 55 Mgmt. Sci. 875 (2009).

1 pro-competitive purposes. Dr. Marx agrees with Drs. Leamer, Hallock, and Manning and finds  
2 that Defendants' conspiracy likely reduced Class compensation. Marx ¶¶ 18-22; Marx Rebuttal  
3 ¶¶ 29-43. Dr. Marx observes that Defendants have advanced no justification for the alleged  
4 conspiracy, and concludes that their purported justifications for their anti-solicitation agreements  
5 are inconsistent with the evidence. He explains that in his decade of experience managing  
6 technical collaborations, and in his academic career studying employer/employee non-compete  
7 agreements, he never encountered anti-solicitation agreements such as those at issue in this case.  
8 Marx ¶ 23. He finds that Defendants attempted to enter into anti-solicitation agreements with  
9 Palm and with Facebook, where no corresponding collaboration existed. *Id.* ¶ 26. Defendants  
10 did not establish anti-solicitation agreements at the time they undertook important technical  
11 collaborations with each other. *Id.* ¶ 27. The individuals who managed and negotiated technical  
12 collaborations among Defendants deny any knowledge that the anti-solicitation agreements even  
13 existed, and the contracts memorializing the collaborations make no mention of the anti-  
14 solicitation agreements. *Id.* ¶¶ 28, 30.a; Marx Rebuttal ¶ 31. Defendants and their experts ignore  
15 that collaborations and other pro-competitive activities occurred before the conspiracy began,  
16 continued among companies without anti-solicitation agreements during the conspiracy, and  
17 continued apace after the anti-solicitation agreements ended. Marx ¶¶ 29-32; Marx Rebuttal ¶¶ 1-  
18 31. "Thus, the record shows that the anti-solicitation agreements did not have anything to do with  
19 these supposed collaborations." Marx ¶ 29.

20 **III. THE LAW REGARDING SUMMARY JUDGMENT AND CONSPIRACY SHOW**  
21 **THAT DEFENDANTS' MOTIONS SHOULD BE DENIED**

22 **A. Legal Standards**

23 **1. Summary Judgment**

24 Summary judgment must be denied unless the evidence plainly demonstrates there is "no  
25 genuine dispute of material fact," and Defendants are "entitled to judgment as a matter of law."  
26 See Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). It is "hornbook  
27 law" that "courts are obligated to construe the evidence in the light most favorable to the non-  
28 moving party, to give the non-moving party the benefit of all reasonable inferences, and to refrain

1 from making credibility determinations.” *Citric Acid*, 191 F.3d at 1094. In “complex antitrust  
2 litigation where motive and intent play leading roles, the proof is largely in the hands of the  
3 alleged conspirators. . . . It is only when the witnesses are present and subject to cross-  
4 examination that their credibility and the weight to be given their testimony can be appraised.”  
5 *Beltz Travel Serv., Inc. v. Int'l Air Transp. Ass'n*, 620 F.2d 1360, 1365 (9th Cir. 1980) (quotation  
6 omitted). Where, as here, a plaintiff alleges a conspiracy that “is economically sensible for the  
7 alleged conspirators to undertake and ‘the challenged activities could not reasonably be perceived  
8 as procompetitive,’” a court may make broad inferences based on circumstantial evidence. *In re  
9 Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) (quoting *In re Flat Glass Antitrust  
10 Litig.*, 385 F.3d 350, 358 (3d Cir. 2004) (discussing inferences permissible under *Matsushita*).  
11 See also *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010) (“Direct  
12 evidence of conspiracy is not a sine qua non”). “Circumstantial evidence is not ‘inherently less  
13 probative than direct evidence.’” *United States v. Zamorano-Leyva*, 220 Fed. Appx. 557, 558  
14 (9th Cir. 2007) (quoting *United States v. Perez*, 491 F.2d 167, 171 (9th Cir. 1974), cert. denied  
15 *sub nom. Lombera v. United States*, 419 U.S. 858 (1974)). Indeed, “circumstantial evidence is  
16 the lifeblood of antitrust law.” *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 536 n.13  
17 (1973).

18 Plaintiffs here “do more than simply show that there is some metaphysical doubt as to the  
19 material facts.” *Matsushita*, 475 U.S. at 586. The direct evidence adduced constitutes more than  
20 a “scintilla of evidence”; and the circumstantial evidence is “evidence on which the jury could  
21 reasonably find” for Plaintiffs (especially when viewed in the light most favorable to Plaintiffs,  
22 with all justifiable inferences in Plaintiffs’ favor). See *Anderson v. Liberty Lobby, Inc.*, 477 U.S.  
23 242, 252, 255 (1986).

24 In *Matsushita*, two American consumer electronics manufacturers alleged a predatory  
25 pricing conspiracy whereby their 21 Japanese competitors suppressed the prices of consumer  
26 electronics in the United States for decades in the hope of driving the American companies out of  
27 business. 475 U.S. at 582-584. The Supreme Court reviewed the evidence and concluded that  
28 the alleged conspiracy was economically irrational and practically infeasible, given that the 21

1 Japanese competitors had cut prices for over twenty years without ever succeeding in their  
2 alleged goal of driving the American companies out of business, and that the plaintiffs continued  
3 to enjoy the largest share of the American retail market. *Id.* at 591-593. Critically, the behavior  
4 complained of—reducing prices—would otherwise be considered pro-competitive: “cutting  
5 prices in order to increase business often is the very essence of competition.” *Id.* at 594. “Thus,  
6 mistaken inferences in cases such as this one are especially costly, because they chill the very  
7 conduct the antitrust laws were designed to protect.” *Id.*<sup>22</sup>

8 As the Ninth Circuit explained in applying *Matsushita* to reverse a district court’s grant of  
9 summary judgment: “In short, the trial court must consider whether, on the evidence presented,  
10 the protection of innocent independent conduct outweighs the costs associated with the potential  
11 decrease in strict antitrust enforcement.” *In re Petroleum Prods. Antitrust Litig.*, 906 F.2d 432,  
12 439 (9th Cir. 1990).<sup>23</sup> Here, Defendants’ conduct was neither “innocent” nor “independent.”  
13 Defendants are not being accused of lowering prices to consumers. The uncontested direct  
14 evidence shows that Defendants all entered into secret agreements to eliminate competition for  
15 their employees. There is no innocent or independent conduct to protect. However, the costs  
16 associated with “the potential decrease in strict antitrust enforcement,” *id.*, would be enormous.  
17 While Defendants agreed to end their illicit agreements as part of the stipulated Final Judgment

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18 <sup>22</sup> See also *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 468 (1992) (“The  
19 Court’s requirement in *Matsushita* that the plaintiffs’ claims make economic sense did not  
20 introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court  
21 did not hold that if the moving party enunciates *any* economic theory supporting its behavior,  
regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment.  
*Matsushita* demands only that the nonmoving party’s inferences be reasonable in order to reach  
the jury, a requirement that was not invented, but merely articulated, in that decision.”).

22 <sup>23</sup> See also *Publ’n Paper*, 690 F.3d at 63 (distinguishing *Matsushita* and reversing summary  
judgment, explaining that “broader inferences are permitted, and the ‘tends to exclude’ standard is  
more easily satisfied, when the conspiracy is economically sensible for the alleged conspirators to  
undertake and ‘the challenged activities could not reasonably be perceived as procompetitive’”)  
(quoting *Flat Glass*, 385 F.3d at 358); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350 (3d Cir.  
2004) (distinguishing *Matsushita* and reversing summary judgment in part); *In re High Fructose  
Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002) (distinguishing *Matsushita* and  
reversing summary judgment, explaining that it is the province of the jury to weigh conflicting  
evidence, and it is error to “suppose that if no single item of evidence presented by the plaintiff  
points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment”);  
*Petruzzi’s IGA Supermarkets, Inc. v. Darling-Del. Co., Inc.*, 998 F.2d 1224 (3d Cir. 1993)  
(distinguishing *Matsushita* and reversing summary judgment); *Apex Oil Co. v. Di Mauro*,  
822 F.2d 246 (2d Cir. 1987) (distinguishing *Matsushita* and reversing summary judgment).

1 with the DOJ, they have not paid any fines and have not compensated the intended targets—their  
2 employees—for the harm Defendants inflicted. “Strict antitrust enforcement” would substantially  
3 diminish if these leading corporate titans could brazenly violate the antitrust laws with no  
4 consequence.

5           **2.       Conspiracy**

6           It is no defense that Defendants’ conspiracy consisted of a network of unlawful bilateral  
7 agreements. It is well established that a single conspiracy may be comprised of—or implemented  
8 through—individual agreements, communications or understandings. *See Blumenthal v. United*  
9 *States*, 332 U.S. 539, 559 (1947) (finding several agreements to be “essential and integral steps”  
10 in forming a single conspiracy); *United States v. Bibbero*, 749 F.2d 581, 587 (9th Cir. 1984) (“A  
11 single conspiracy may involve several subagreements or subgroups of conspirators.”). Because  
12 “[s]ecrecy and concealment are essential features of successful conspiracy,” the “law rightly gives  
13 room for allowing the conviction of those discovered upon showing sufficiently the essential  
14 nature of the plan and their connections with it, without requiring evidence of knowledge of all its  
15 details or of the participation of others.” *Blumenthal*, 332 U.S. at 557. The unlawful nature of  
16 Defendants’ conspiracy and their network of bilateral agreements should be determined together,  
17 not piecemeal. *Cont'l Ore*, 370 U.S. at 699; *Standard Oil Co. v. United States*, 337 U.S. 293  
18 (1949); *Twin City Sportservice Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1303 (9th Cir  
19 1982) (“[c]reating such a distinction would require courts to enforce arguably innocuous single  
20 contracts that belong to a pattern of contractual relations that significantly restrain trade”).

21           Resolution of the issue of whether there is a single conspiracy or separate ones is  
22 ordinarily an issue for the finder of fact. Determining whether a “single conspiracy has been  
23 proved, rather than multiple conspiracies . . . is essentially a question of the sufficiency of the  
24 evidence.” *Bibbero*, 749 F.2d at 586. At trial, the trier of fact will consider “the nature of the  
25 scheme; the identity of the participants; the quality, frequency, and duration of each conspirator’s  
26 transactions; and the commonality of time and goals.” *Id.* at 587. Such evidence will sustain a  
27 finding of a single conspiracy.<sup>24</sup> *See also United States v. Bloch*, 696 F.2d 1213, 1215 (9th Cir.

28           <sup>24</sup> *See United States ex rel. Miller v. Harbert Int’l Constr., Inc.*, 608 F.3d 871 (D.C. Cir. 2012)  
Footnote continued on next page

1 1982) (court upheld jury's finding of a single conspiracy because the "conspiracy involved the  
2 same scheme, the same central actors, the same activities, and the same goals."); *United States v.*  
3 *Burns*, No. 98-50771, 2000 U.S. App. LEXIS 15801, \*3-6 (9th Cir. July 6, 2000) ("Whether there  
4 is one conspiracy or many is a question of fact for the jury to decide").

5 For instance, in *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 221,  
6 226 (3d Cir. 2008), the Third Circuit reversed summary judgment of antitrust conspiracy claims  
7 involving horizontal agreements among Mack truck dealers and a vertical agreement among  
8 Mack and its dealers. Addressing whether the plaintiffs submitted sufficient evidence to  
9 overcome summary judgment on the horizontal agreements under *Matsushita*, the court stated:

10 [Plaintiff] presented several pieces of direct evidence for the existence of one or  
11 more agreements among Mack dealers not to compete with each other. Because we  
12 conclude that [plaintiff]'s direct evidence is sufficient to allow a jury to conclude  
13 that a conspiracy not to compete existed among Mack dealers, *we need not apply*  
*the rules restricting inferences drawn from circumstantial evidence*. . . . Mack  
14 argues that [plaintiff]'s evidence is insufficient to give to a jury because *the record*  
*does not reveal the exact extent of any such agreements*. . . . It may well be that  
15 [plaintiff]'s inability to present the details of any agreement among dealers would  
leave a jury unpersuaded that such agreements did in fact exist. That, however, is  
16 not our inquiry. Instead, we must consider whether the evidence entitles [plaintiff]  
to place that question before the jury at all. We believe it does. Simply put,  
17 [plaintiff]'s evidence was sufficient because a jury considering it could believe it  
and reasonably conclude that agreements not to compete did exist among Mack  
dealers.

18 *Id.* at 220 (emphasis added). The same outcome is required here. Plaintiffs have provided direct  
evidence of unlawful horizontal agreements among Defendants, which Defendants admit.  
19 Defendants may dispute the *exact extent* of the conspiracy. But, as in *Mack Trucks*, the question  
20 is clearly one for the jury to decide.

21 It is also not a defense if one is coerced into violating the antitrust laws. Acquiescence is  
22 sufficient to establish participation in a conspiracy, and the acquiescing party need only know of  
23 the anticompetitive effect. *United States v. Paramount Pictures*, 334 U.S. 131, 161 (1948)  
24 ("acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and  
25 promotion of one"). *See also Virginia Vermiculite, Ltd. v. W.R. Grace & Co.*, 156 F.3d 535, 541

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26 *Footnote continued from previous page*  
27 (upholding jury verdict's finding of an overarching conspiracy); *United States v. Hemphill*,  
514 F.3d 1350, 1364 (D.C. Cir. 2008) (same); *United States v. DeVarona*, 872 F.2d 114, 120 (5th  
28 Cir. 1989) (same); *United States v. Kelly*, 892 F.2d 255, 259 (3d Cir. 1989) (same).

1 (4th Cir. 1998) (same); *MCM Partners, Inc. v. Andrews-Bartlett & Associates, Inc.*, 62 F.3d 967,  
2 973 (7th Cir. 1995) (“[T]he ‘combination or conspiracy’ element of Section 1 violation is not  
3 negated by the fact that one or more of the co-conspirators acted unwillingly, reluctantly, or only  
4 in response to coercion.”).

5 Nor is it necessary, as Defendants contend, for all underlying agreements to begin at the  
6 same moment: “It is not clear at what precise point of time each appellee became aware of the  
7 fact that its contract was not an isolated transaction but part of a larger arrangement.” *United*  
8 *States v. Masonite Corp.*, 316 U.S. 265, 274-75 (1942) (reversing post-trial dismissal of antitrust  
9 conspiracy). *See also Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939) (“It is  
10 elementary that an unlawful conspiracy may be and often is formed without simultaneous action  
11 or agreement on the part of the conspirators.”); *United States v. Nat'l Lead Co.*, 332 U.S. 319,  
12 325-27 (1947) (defendant joined the conspiracy thirteen years after inception); *Indus. Bldg.*  
13 *Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1343 (9th Cir. 1970) (defendant joined the  
14 conspiracy two years after inception); *United States v. Cont'l Group, Inc.*, 603 F.2d 444, 452-53  
15 (3d Cir. 1979) (no need “to prove that [Defendant] participated in the conspiracy from its  
16 inception, but only that he knowingly became a member of the ongoing conspiracy”—defendants  
17 joined ten and nineteen years after inception) (citation omitted); *In re Elec. Books Antitrust Litig.*,  
18 859 F. Supp. 2d 671, 689 (S.D.N.Y. 2012) (“a conspirator may join a conspiracy at any time that  
19 it is ongoing; there is no requirement that a conspirator join in a conspiracy from its inception”).

20 Defendants also assert that because each of their bilateral agreements were in their  
21 individual self-interest, those agreements cannot be used to infer the alleged conspiracy.  
22 Defendants are incorrect, regardless of whether their bilateral agreements were lawful (and they  
23 were not). “It is of no consequence, for purposes of determining whether there has been a  
24 combination or conspiracy under § 1 of the Sherman Act, that each party acted in its own lawful  
25 interest.” *United States v. General Motors Corp.*, 384 U.S. 127, 142 (1966). *See also Masonite*,  
26 316 U.S. at 276 (“the fact that there were business reasons which made the arrangements  
27 desirable to the appellees . . . would be no more a legal justification for price-fixing than were the  
28 ‘competitive evils’ in the *Socony-Vacuum* case.”); *United States v. Apple Inc.*, No. 12 Civ. 2826

1 (DLC), 2013 U.S. Dist. LEXIS 96424, at \*152 (S.D.N.Y. July 10, 2013) (“It is not surprising that  
2 Apple chose to further its own independent, economic interests. Such a motivation, however,  
3 does not insulate a defendant from liability for illegal conduct.”) (citing *General Motors*,  
4 384 U.S. at 142).

5 At trial, the jury will be instructed that, to create a conspiracy, “two or more persons must  
6 enter into an agreement that they will act together for some unlawful purpose,” and that “the  
7 evidence need not show that its members entered into any formal or written agreement; that they  
8 met together; or that they directly stated what their object or purpose was, or the details of it, or  
9 the means by which they would accomplish their purpose. The agreement itself may have been  
10 entirely unspoken.” ABA Model Jury Instructions in Civil Antitrust Cases (2005 ed.) (“Jury  
11 Instructions”) at B-2 to B-3. The jury will be asked whether the evidence shows that each  
12 defendant “knowingly joined in the unlawful plan at its inception or some later time with the  
13 intent to advance or further some object or purpose of the conspiracy.” Jury Instructions, at B-13.  
14 “A person may become a member of a conspiracy without full knowledge of all the details of the  
15 conspiracy, the identity of all its members, or the parts they played.” *Id.* at B-13. “If you find  
16 that the alleged conspiracy existed, then the acts and statements of the conspirators are binding on  
17 all those whom you find were members of the conspiracy.” *Id.* at B-14. Moreover, it is not  
18 necessary that each member of the conspiracy participate in “every detail in the execution of the  
19 conspiracy . . . to establish liability, for each conspirator may be performing different tasks to  
20 bring about the desired result.” *Beltz*, 620 F.2d at 1367 (“If Beltz can establish the existence of a  
21 conspiracy in violation of the antitrust laws and that appellees were a part of such a conspiracy,  
22 appellees will be liable for the acts of all members of the conspiracy in furtherance of the  
23 conspiracy, regardless of the nature of appellees’ own actions.”). *See also Twentieth Century-Fox*  
24 *Film Corp. v. Harkins Amusement Enters., Inc.*, No. 90-80190, 1990 U.S. App. LEXIS 21836, at  
25 \*2-3 (9th Cir. Aug. 20, 1990) (citing *Beltz*, holding that Plaintiffs may establish “liability of a  
26 distributor for participating in an overall conspiracy against [plaintiff] that, unknown to it,  
27 involved other distributors,” and “each of those distributors would be jointly and severally liable  
28 for all damages flowing from the conspiracy . . .”).

1           The voluminous record provides ample basis for the jury to reasonably find for Plaintiffs,  
2 particularly when that record is viewed in the light most favorable to Plaintiffs and all justifiable  
3 inferences are drawn in their favor. *Liberty Lobby*, 477 U.S. at 252, 255.

4           **3. Defendants' Cases Are Inapposite**

5           This is not a case where a jury will be asked to infer a concerted violation from mere  
6 parallel conduct. *White v. R.M. Packer Co.* concerned price fixing in a “geographically  
7 constrained gasoline market with *publicly* posted prices,” in contrast to the secret pacts at issue  
8 here. 635 F.3d 571, 577 (1st Cir. 2011) (emphasis added). The court distinguished this  
9 phenomenon from a tacit agreement, which is sufficient to sustain a section 1 claim, explaining  
10 that while tacit agreements may also involve “uniform behavior among competitors,” it is  
11 “preceded by conversations implying that later uniformity might prove desirable or accompanied  
12 by other conduct that in context suggests that each competitor failed to make an independent  
13 decision.” *Id.* at 576 (internal quotation marks and citation omitted). The context here provides  
14 ample evidence suggesting that Defendants were not making independent decisions.

15           *Wilcox v. First Interstate Bank, N.A.*, 815 F.2d 522 (9th Cir. 1987), also concerned  
16 publicly-available prices and is distinguishable on the same basis. There, the defendant bank was  
17 accused of price-fixing based on its interest rates paralleling those of other banks. *Id.* at 524.  
18 Similar to *White*, those rates were publicly available. *Id.* at 526 (noting “publication by the wire  
19 services”). The court affirmed summary judgment because nothing the plaintiffs presented  
20 suggested that the bank was engaging in more than conscious parallelism. *Id.* at 527 (requiring  
21 conscious parallelism to be accompanied by additional evidence). As already explained, here,  
22 Defendants are not just independently “following the [publicly-disclosed actions] of an industry  
23 leader.” *Id.* Plaintiffs present more than just evidence of Defendants mimicking each other’s  
24 publicly-known conduct.

25           Also distinguishable are Defendants’ cases addressing motions to dismiss, finding that  
26 plaintiffs’ pleadings failed to state claims based on independent bilateral agreements between  
27 defendants. For instance, separate from being distinguishable because the agreements there were  
28 “strictly vertical in nature,” the conspiracy alleged in *In re Ins. Brokerage Antitrust Litig.* rested

simply on defendants' engaging in similar conduct between insurance brokers and their partners-insurers. 618 F.3d 300, 335-36 (3d Cir. 2010). The court found nothing to suggest a "plausible inference of horizontal conspiracy," noting that "the complaints themselves provide obvious reasons to conclude that the brokers were able to steer clients to preferred insurers without the need for any agreement among the insurers." *Id.* at 335. This Court has already come to the opposite conclusion based upon allegations that have since been supported by direct and circumstances evidence. *High-Tech I*, 856 F. Supp. 2d at 1120. Defendants also rely on *Dickson v. Microsoft Corp.*, another case where the plaintiffs failed to state a claim based on their challenge of vertical agreements. 309 F.3d 193 (4th Cir. 2002). There, the plaintiffs alleged a single conspiracy involving Microsoft and various computer manufacturers, claiming that Microsoft entered into "licensing agreements" with the manufacturers that contained identical anticompetitive provisions. *Id.* at 199. Plaintiffs failed to allege "an overlap of key actors, methods, and goals," which the court noted was sufficient to support an inference of conspiracy in the criminal context. *Id.* at 203 n.12 (internal quotation marks and citation omitted). The case bears no relationship to the rich evidence here.

Finally, attempting to reinforce its unavailing reliance on *Insurance Brokerage* and *Dickson*, Google cites *Toys "R" Us v. FTC*, 221 F.3d 928 (7th Cir. 2000), asserting that this case teaches that "vertical agreements with multiple manufacturers" constitute rimless conspiracies insufficient to support allegations of a single conspiracy. Google MSJ at 12. Google misstates the case, citing to the court's recitation of the **defendant's** characterization of the conspiracy, which the court **rejected**. *Id.* at 935 ("We need only decide whether the inference the Commission drew of horizontal agreement was a permissible one from that evidence, not if it was the only possible one. . . . The commission is right."). The Seventh Circuit applied *Interstate Circuit*, 306 U.S. at 223-34, and found that a "horizontal agreement" among the toy manufacturers was supported by "direct evidence of communications" among the competitors and knowledge of the overall goals of the conspiracy. *Id.* at 936 (rejecting defendant's attempt to "avoid this result by hypothesizing independent motives."). Plaintiffs present such evidence here.

1                   **B.        Defendants Cannot Satisfy Their Initial Burden Under *Matsushita***

2                   Even if the Court determines that Plaintiffs rely “entirely upon circumstantial evidence,”  
3 Defendants bear the initial burden of showing: (1) that their conduct “is consistent with other  
4 plausible explanations, and (2) permitting an inference of conspiracy would pose a significant  
5 deterrent to beneficial procompetitive behavior.” *Petroleum Prods.*, 906 F.2d at 440. *See also*  
6 *Citric Acid*, 191 F.3d at 1094 (when a “plaintiff rests its case entirely on circumstantial evidence”  
7 a defendant can rebut an allegation of conspiracy “by showing a plausible and justifiable reason  
8 for its conduct that is consistent with proper business practice.”) (internal quotation marks and  
9 citation omitted). Defendants cannot satisfy their initial burden because they have failed to  
10 provide a plausible alternative explanation, and they cannot show that their anti-solicitation  
11 agreements were procompetitive, justifiable, or consistent with proper business practice.

12                  **1.        Defendants Provide No Alternative Plausible Explanation For The**  
13                  **Alleged Conspiracy**

14                  Defendants cannot show that the alleged conspiracy is consistent with other plausible  
15 explanations for the simple reason that Defendants have not provided any. Defendants have not  
16 made any attempt to explain how six identical, secret anti-solicitation agreements could have  
17 arisen at the same time, operating continuously and concurrently for five years, among such a  
18 small, close-knit group of senior executives without “a unity of purpose, a common design and  
19 understanding, or a meeting of minds in an unlawful arrangement.” *High-Tech I*, 856 F. Supp. 2d  
20 at 1120 (quoting *Monsanto*, 465 U.S. at 764). *See also Am. Tobacco Co. v. United States*, 328  
21 U.S. 781, 805 (1946) (evidence showed improbable common conduct for which the defendants  
22 offered no legitimate justification). Defendants ignore the relevant inquiry under controlling  
23 authority. A conspiracy must be viewed as the sum of its parts, not each part separately. *High-*  
24 *Tech I*, 856 F. Supp. 2d at 1118 (quoting *Cont'l Ore*, 370 U.S. at 699).

25                  Defendants’ Joint Motion for Summary Judgment is a single page and says nothing about  
26 the alleged conspiracy “as a whole.” Instead, each Defendant filed an individual motion,  
27 selectively addressing only certain issues as to that Defendant. “The crucial question, however, is  
28 whether the evidence *considered as a whole* can support an inference of conspiracy[.]” *Citric*

1      *Acid*, 191 F.3d at 1105-06 (emphasis in original); *see also Cont'l Ore*, 370 U.S. at 699.  
2      Defendants ignore the “‘larger picture’ of senior executives from closely connected high-tech  
3      companies in Northern California contemporaneously negotiating and enforcing six bilateral ‘Do  
4      Not Cold Call’ agreements.” *High-Tech I*, 856 F. Supp. 2d at 1120.

5                For instance, Apple begins its argument with the remarkable assertion that there is “not a  
6      shred of evidence” suggesting that “Apple entered into any agreement with the intent or purpose  
7      to suppress the compensation of its own employees, let alone the compensation of [other  
8      Defendants].” Apple MSJ at 1. Apple ignores the alleged statements by Mr. Jobs in the CAC  
9      that the Court already found do exactly that, *High-Tech I*, 856 F. Supp. 2d at 1119, or the direct  
10     evidence produced by Plaintiffs establishing that those communications in fact occurred.  
11     *Compare CAC ¶¶ 94 and 95 with Colligan Decl., Exs. A and B.* Apple ignores admissions from  
12     other Defendants, such as the testimony of Mr. Lucas and Mr. Catmull, and Mr. Catmull’s  
13     admission that Mr. Jobs [REDACTED]

14                [REDACTED] Catmull 61:13-19. Apple compounds the misrepresentation by asserting  
15     that Plaintiffs’ expert Dr. Marx “concedes” the lack of evidence from which to infer  
16     anticompetitive intent. Apple MSJ at 1. In fact, as Dr. Marx explained at length in his reports  
17     and at his deposition: “It is clear from the evidence that the anti-solicitation agreements were  
18     established for the purpose of suppressing compensation.” Marx ¶ 6.d. *See also id.* ¶¶ 7-17  
19     (assessing evidence of common anticompetitive purpose); 18-22 (explaining how Defendants’  
20     anti-solicitation agreements likely suppressed Class compensation); 23-32 (opining that the  
21     record demonstrates that Defendants’ anti-solicitation agreements had “nothing to do” with their  
22     proffered justification of facilitating technical collaborations); Marx Rebuttal ¶¶ 8-43 (explaining  
23     why Defendants’ experts fail to establish any legitimate justification for Defendants’  
24     misconduct); Marx Dep. 280:19-288:1 (explaining his bases for inferring anticompetitive  
25     purpose).

26                Each Defendant likewise retained its own expert who ignored the alleged conspiracy “as a  
27     whole” and instead only examined the “separate part” (relying on only a very selective subset of  
28     evidence) as to that Defendant. While Defendants all concede that they entered into the alleged

1 bilateral agreements, they provide after-the-fact rationales for them. These explanations are  
2 pretextual, do not comport with the plain language of contemporaneous documents, and  
3 improperly invite the Court to resolve credibility issues or weigh evidence, as prohibited by such  
4 cases as *Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir. 1999) (*en banc*).

5 Adobe retained Dr. David Lewin, who reviewed only Adobe fact witness depositions and  
6 virtually no business records produced by other Defendants. Lewin, Ex. 2. Dr. Lewin offers no  
7 opinion on the plausibility or justification for the alleged conspiracy, or even the Adobe / Apple  
8 anti-solicitation agreement. Intel retained Dr. Edward Snyder, who reviewed a total of nine  
9 business records (six produced by Intel and three produced by Google) and only two fact witness  
10 depositions, both Intel. Snyder, App. C. Dr. Snyder accordingly limited his task to whether the  
11 Google / Intel agreement, standing alone, had pro-competitive justifications. Snyder ¶ 10.  
12 Google retained Dr. Talley, who reviewed only fact witness depositions of Google witnesses (and  
13 the deposition of Mr. Campbell). Talley, App. B. Dr. Talley limited his task to examining only  
14 the individual agreements to which Google entered, but ignored all other evidence, including even  
15 the attempted recruiting “truce” Google sought with Facebook that his proffered justifications  
16 cannot possibly explain (Google had no technical collaboration with Facebook and no  
17 overlapping board member).<sup>25</sup> Dr. Talley also admitted he does not advance an alternative  
18 explanation for how Defendants’ anti-solicitation agreements could have arisen without  
19 coordination or common understanding; he has no opinion regarding whether the alleged  
20 conspiracy actually occurred; and he did not examine evidence regarding agreements to which  
21 Google was not an express party. Talley Dep. 239:17-241:10. Apple retained Dr. Kevin Murphy  
22 to evaluate documentary evidence regarding Apple, despite his earlier admission that he is  
23 unqualified to perform the task: “I got no particular advantage of reading documents. I’m  
24 probably worse at reading documents than most people.” July 5, 2013 Murphy Dep. at 443:12-  
25 15. Like Defendants’ other experts, Dr. Murphy only evaluated anti-solicitation agreements to  
26 which Apple is a direct party, and he provided no explanation for how the full set of anti-  
27 solicitation agreements could have arisen without coordination or communication. Murphy

28 <sup>25</sup> Ex. 667; Rosenberg Dep. 122:20-127:9; Sandberg Decl. ¶¶ 1-7.

1 Report.<sup>26</sup>

2 Defendants cannot show a plausible, alternative explanation for the alleged conspiracy as  
3 a whole. They have not even tried.

4 **2. Defendants Cannot Show That The Alleged Conspiracy Was  
5 Otherwise Pro-Competitive**

6 The inference of conspiracy here is not based upon otherwise pro-competitive behavior,  
7 but from a network of secret, company-wide anti-solicitation agreements, misconduct that  
8 Defendants now concede occurred.<sup>27</sup> Such secret collusion among horizontal competitors to  
9 eliminate competition among them is not “the very essence of competition,” *Matsushita*, 475 U.S.  
10 at 594, it is the “supreme evil of antitrust,” *Verizon Communs., Inc. v. Law Offices of Curtis V.  
Trinko, LLP*, 540 U.S. 398, 408 (2004).

11 The unlawful nature of Defendants’ misconduct is further confirmed by the DOJ  
12 investigation. The DOJ concluded that Defendants’ anti-solicitation agreements, with or without  
13 a common understanding or shared purpose among them, were all per se violations of the  
14 Sherman act because “the agreements were naked restraints and not ancillary to achieving  
15 legitimate business purposes.” DOJ Competitive Impact Statement at 6 (formatted). Defendants  
16 stipulated to a Final Judgment in which they agreed that their anti-solicitation agreements would  
17 thereafter be prohibited, and agreed to a variety of compliance measures to ensure that such  
18 agreements would never reoccur. Final Judgment. These measures include furnishing the Final  
19

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20 <sup>26</sup> All six of Defendants’ experts improperly reply upon, and uncritically accept as true,  
21 Defendants’ interrogatory responses and attorney-drafted declarations. Plaintiffs have moved to  
22 exclude any expert opinions premised upon these documents. Dkt. 565. See *Therasense, Inc. v.  
Becton Dickinson and Co.*, No. 04-02123 WHA, Omnibus Order on Motion for Final Pretrial  
23 Conference Submitted With Oral Argument, Dkt. 1024 at 2 (May 22, 2008) (“One of the worst  
abuses in civil litigation is the attempted spoon-feeding of client-prepared and lawyer-  
orchestrated ‘facts’ to a hired expert who then ‘relies’ on the information to express an opinion.”),  
24 attached to Harvey Decl, Ex. 206.

25 <sup>27</sup> Perversely, Defendants seek to use the strength of this unambiguous evidence of explicit  
agreements to undermine the legitimate plausible inference of a broader conspiracy which this  
evidence, together with other strong circumstantial evidence, permits. It is settled law that “no  
26 formal agreement is necessary to constitute an unlawful conspiracy.” *Am. Tobacco Co.*, 328 U.S.  
at 809; *United States v. Gen. Motors Corp.*, 342 U.S. at 142-143 (“explicit agreement is not a  
27 necessary part of a Sherman Act conspiracy”). Even “[s]eemingly innocent or ambiguous  
behavior can give rise to a reasonable inference of conspiracy in light of the background against  
28 which the behavior takes place.” *Apex*, 822 F.2d at 255.

1 Judgment and the DOJ’s Competitive Impact Statement to “each Defendant’s officers, directors,  
2 human resource managers, and senior managers who supervise employee recruiting, solicitation,  
3 or hiring efforts”; training those individuals annually “on the meaning and requirements” of the  
4 “Final Judgment and the antitrust laws”; and requiring a certification from each of those  
5 individuals that he or she understands and has abided by the Final Judgment, is not aware of any  
6 violations that have not been reported, and understands that “failure to comply with [the] Final  
7 Judgment may result in an enforcement action for *civil or criminal contempt* of court against  
8 each Defendant and/or any person who violates this Final Judgment[.]” Final Judgment at 7-9  
9 (emphasis added). Defendants ended their anti-solicitation agreements and appear to have abided  
10 by the Final Judgment. *See, e.g.*, J. Morris 165:13-16 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 Thus, an inference of conspiracy here cannot “have the effect of deterring significant procompetitive  
15 conduct.” *Petroleum Prods.*, 906 F.2d at 439.

16 Defendants’ attempt to construct after-the-fact justifications for these secret agreements is  
17 unavailing. The limited analyses of defense experts Drs. Lewin, Murphy, Talley, and Snyder  
18 only further demonstrate Defendants’ failure to show “a plausible and justifiable reason for [their]  
19 conduct that is consistent with proper business practice.” *Citric Acid*, 191 F.3d at 1094 (internal  
20 quotation marks omitted). First, Defendants’ experts could not provide a single example of such  
21 secret anti-solicitation agreements outside of the facts of this case. Defendants’ experts also  
22 could not point to a single collaboration that would not have occurred but for the anti-solicitation  
23 agreements. The best these experts could do is assert that such agreements are “consistent” with  
24 “consensus best practices” regarding “collaboration among potential competitors.” Talley Report  
25 at 11. However, as Dr. Talley admitted at his deposition, his only support for this assertion is the  
26 “Model Merger Agreement for the Acquisition of a Public Company,” an ABA publication that is  
27 irrelevant to the conduct at issue in this case. Talley Dep. 140:20-146:13; Ex. 2923. The  
28 document concerns an acquisition of one company by another, and Dr. Talley confirmed there

1 was no evidence that this occurred, or was even contemplated among the Defendants. Talley  
2 Dep. 142:12-18. Moreover, the ABA publication does not even suggest that anti-solicitation  
3 agreements such as those at issue in this case are appropriate to facilitate mergers; to the contrary,  
4 the treatise suggests limiting any anti-solicitation agreements in just the way the Final Judgment  
5 requires. *Compare* Ex. 2923 at 366-367 *with* Ex. 166 at 5-6. *See also* Talley Dep. 142:2-  
6 146:23.<sup>28</sup>

7 Second, their opinion that the anti-solicitation agreements were important to facilitate pro-  
8 competitive technical collaborations finds no support in the record. Aside from uncritically  
9 adopting attorney-drafted interrogatory responses and declarations, Defendants' experts rely on  
10 the fact that these Defendants collaborated with each other while their anti-solicitation  
11 agreements were in place. By contrast, Dr. Marx examines Defendants' claim by looking at the  
12 evidence as a whole and determines whether: (1) the anti-solicitation agreements were tied to  
13 technical collaborations; and (2) whether technical collaborations among Defendants were tied to  
14 anti-solicitation agreements. Marx ¶ 5. Dr. Marx finds that the evidence is inconsistent with  
15 Defendants' claimed justifications. *See Part II, supra.* Dr. Talley admitted that none of the  
16 collaboration contracts mention the anti-solicitation agreements, and that the written contracts by  
17 their own terms constitute the entire agreements between the parties concerning the  
18 collaborations.<sup>29</sup> Talley Dep. 116:23-117:12; 217:16-22.

19

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20 <sup>28</sup> Like Defendants' other experts, Dr. Talley could not provide a single example of any other  
21 anti-solicitation agreement such as those at issue in this case. Talley Dep. 35:15-23. Dr. Talley  
22 insisted he has never advised his students to enter into such agreements, *id.* 62:1-12 ("[T]his  
23 should not be understood as advising them to get into such agreements willy-nilly"); and  
24 Dr. Talley testified that, after his work on this case, he may use the DOJ consent decree as a  
25 teaching tool for his students, *id.* 64:24-65:13. In his own work advising boards of directors, he  
26 has never advised them to enter into such anti-solicitation agreements. *Id.* 30:19-31:12.

27 <sup>29</sup> At his deposition, Dr. Talley retreated to the untenable position that Defendants did not  
28 describe their anti-solicitation agreements in their collaboration contracts because they relied on  
California's liberal interpretation of the parol evidence rule. Talley Dep. 217:16-224:1. In  
addition to being absurd, the argument is also incorrect as a matter of law. *See generally*  
2 Witkin, Cal. Evidence, Documentary Evidence § 71 (5th ed.) ("Merger clauses have been held  
conclusive on the issue of integration, so that parol evidence to show that the parties did not  
intend the writing to constitute the sole agreement will be excluded.") (collecting cases). The  
term would also be unenforceable given that it would constitute illegal consideration to  
accomplish an illegal objective, in violation of state and federal antitrust law. *See generally*  
1 Witkin, Contracts, §§ 419-420 (collecting cases re illegal consideration and illegal object).

1 Defendants' experts responded to Dr. Marx's analysis by ignoring the evidence on which  
2 he relied. As explained above, none of Defendants' experts examined the evidence as a whole, as  
3 Dr. Marx did. Defendants confined their analyses still further by looking exclusively to the  
4 conspiracy period, ignoring that the same technical collaborations existed before the anti-  
5 solicitation agreements began, and that technical collaborations continued apace after the anti-  
6 solicitation agreements ended. *See, e.g.*, Talley Dep. 136:19-137:9. That Defendants'  
7 collaborations continued uninterrupted after Defendants eliminated the anti-solicitation  
8 agreements demonstrates the lack of connection. As Apple CEO Tim Cook explained: [REDACTED]  
9 [REDACTED]  
10 [REDACTED] Cook 58:5-7. [REDACTED]

11 *Id.* at 75:1-2. Defendants and their experts ignore this inconvenient fact.

12 Third, their opinions that the anti-solicitation agreements were important to maintaining  
13 good board relations or were otherwise critical for developing a relationship of "mutual trust,"  
14 Murphy November 25, 2013 Report ¶45, are also inconsistent with the evidence. Apple had no  
15 overlapping board member with Palm; Apple had no overlapping board member with Google  
16 when Mr. Jobs and Mr. Brin agreed to a secret anti-solicitation pact (Mr. Schmidt joined Apple's  
17 Board later); Mr. Campbell's "advice" to Google long predicated his request that Intuit be brought  
18 into the fold, and his work with Google continued after the anti-solicitation agreements ended;  
19 Mr. Otellini served on the Google board well before he and Mr. Schmidt struck a secret  
20 "handshake" anti-solicitation deal, and Mr. Otellini continues to sit on Google's Board today,  
21 years after the DOJ consent decree; and Google had no overlapping board member with  
22 Facebook, with which it also tried to secure a non-recruit agreement. In addition, Defendants'  
23 experts ignore deposition testimony confirming that conflicts of interest were never discussed in  
24 the context of the anti-solicitation agreements. For instance, Shona Brown, Google's head of HR  
25 and member of the Executive Management Group, explained: [REDACTED]  
26 [REDACTED]  
27 [REDACTED] Brown 39:16-21.

28 Finally, it is uncontested that the scope of the anti-solicitation agreements went far beyond

any possible legitimate collaborations. Defendants concede that their anti-solicitation agreements were entirely inconsistent with the requirements of the Final Judgment.<sup>30</sup> They were secret, unwritten, and not connected to any specific collaboration. They prohibited recruitment of *all* employees, regardless of title, job function, connection to collaboration (such as visibility to the collaborator), location, or time period. Thus, Defendants' anti-solicitation agreements far exceeded any possible appropriate restriction.

Accordingly, Defendants cannot satisfy their initial burden of showing that their anti-solicitation agreements were "justifiable" and "consistent with proper business practice." *Citric Acid*, 191 F.3d at 1094 (internal quotation marks omitted).

**C. Even if Defendants Satisfied Their Initial Burden, Plaintiffs Have Provided Substantial Evidence Tending To Show That Defendants Were Not Engaging in Permissible Competitive Behavior**

Even if the Court concludes that Defendants rebut Plaintiffs' allegation of conspiracy "by showing a plausible and justifiable reason for [their] conduct that is consistent with proper business practice," summary judgment is nonetheless improper because of the evidence "tending to show" that Defendants were "not engaging in permissible competitive behavior." *Citric Acid*, 191 F.3d at 1094 (internal quotation marks and citation omitted). Regardless of whether Defendants carry their initial burden, the contrary evidence at the very least creates genuine disputes of material fact. As explained above in Part II, *supra*, the evidence confirms the alleged facts that the Court earlier found "tend[] to exclude the possibility of independent action," creating a "jury issue." *High-Tech I*, 856 F. Supp. 2d at 1117 (quoting *Monsanto*, 465 U.S. at 764).

**1. The Anti-Solicitation Agreements Were Not Independent, Pro-Competitive, or Justifiable**

First, as explained above, the underlying conduct at issue—the express anti-solicitation

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<sup>30</sup> Defendants' anti-solicitation agreements did not identify the specific legitimate agreement to which they are ancillary; they were not narrowly tailored to affect only employees who are anticipated to be directly involved in the agreement; they did not identify with reasonable specificity the employees who are subject to the agreement; they did not contain a specific termination date or event; and they were not signed by all parties to the agreement. See Final Judgment at 5-7. See also Marx ¶¶ 30-32.

1 agreements—were inherently collusive, anti-competitive, and unjustified. Parts II, III.B, *supra*.  
2 Every Defendant concedes that it entered into at least one secret anti-solicitation agreement with  
3 another Defendant that was just as overbroad and impermissible as the DOJ and Plaintiffs alleged.  
4 Every Defendant stipulated to a Final Judgment in which their senior executives are subject to  
5 civil or criminal contempt for failing to report any potential recurrence. This is not a case  
6 challenging the “very essence of competition.” *Matsushita*, 475 U.S. at 594.

7           **2. Defendants Had A Shared Motive to Conspire**

8 Second, Defendants had a motive to conspire to suppress employee compensation and  
9 mobility. “Plaintiffs describe a plausible scenario as to how, in light of basic economic  
10 principles, these agreements formed an overarching conspiracy that resulted in artificially lowere  
11 salaries.” *High-Tech I*, 856 F. Supp. 2d at 1117. The Court has already examined this evidence  
12 in detail. “First, Plaintiffs set forth contemporaneous documents from Defendants’ internal files  
13 which show that Defendants viewed competition for workers—including against other  
14 Defendants in this lawsuit—as a significant problem.” *High-Tech II*, 289 F.R.D. at 570.  
15 “Second, the evidence indicates that Defendants viewed recruitment, including cold calling, as  
16 crucial to their growth and development.” *Id.* “Third, the evidence indicates that, but for anti-  
17 solicitation agreements, high-tech companies would solicit one another’s employees.” *Id.* at 571.  
18 “Fourth, Plaintiffs have offered evidence indicating that Defendants believed that increased  
19 competition for workers could lead to higher wages for employees.” *Id.* “Fifth, Plaintiffs have  
20 set forth evidence showing that cold-calling and solicitation could transmit salary information that  
21 spread well beyond any single individual who received a job offer, which supports Dr. Leamer’s  
22 price discovery theory.” *Id.* “In addition, documentary evidence indicates that Defendants  
23 recognized that challenges posed by increased competition for employees often required  
24 systematic rather than isolated compensation increases.” *Id.* “Plaintiffs’ evidence also supports  
25 Dr. Leamer’s theory that Defendants’ anti-solicitation agreements were intended to avoid  
26 ‘bidding wars’ for personnel that could drive up wages.” *Id.* “The evidence also indicates that, to  
27 avoid bidding wars that could drive up wages, Defendants structured the agreements to apply to  
28 all employees, regardless of job type, department, or geography.” *Id.* “Indeed, the sustained

1 personal efforts by the corporations' own chief executives, including but not limited to Apple  
2 CEO Steve Jobs, Google CEO Eric Schmidt, Pixar President Ed Catmull, Intuit Chairman Bill  
3 Campbell, and Intel CEO Paul Otellini, to monitor and enforce these agreements indicate that the  
4 agreements may have had broad effects on Defendants' employees." *Id.* at 572. "Finally, based  
5 on the evidence, it appears that Defendants recognized that eliminating the anti-solicitation  
6 agreements would lead to greater competition for employees and require enhanced incentives for  
7 retaining employees." *Id.* See also *High-Tech III*, 2013 U.S. Dist. LEXIS 153752, at \*55-110  
8 (reviewing evidence). "The evidence therefore indicates that Defendants sought to enter into  
9 anti-solicitation agreements in an effort to stifle increased competition for labor and rising wages.  
10 To the extent that they were successful, Defendants did not need to increase compensation as  
11 much as they otherwise would have to attract and retain employees." *Id.* at \*109.

12           **3.       Defendants' Identical, Bilateral Agreements Were Not Reached In**  
13           **Isolation**

14           Third, Defendants' anti-solicitation agreements were not reached in isolation. Plaintiffs  
15 have provided direct evidence regarding a "'larger picture' of senior executives from closely  
16 connected high-tech companies in Northern California contemporaneously negotiating and  
17 enforcing six bilateral 'Do Not Cold Call' agreements." *High-Tech I*, 856 F. Supp. 2d at 1120.  
18 "The fact that all six identical bilateral agreements were reached in secrecy among seven  
19 Defendants in a span of two years suggests that these agreements resulted from collusion, and not  
20 from coincidence." *Id.* Plaintiffs' allegations, now backed by substantial direct and  
21 circumstantial evidence, show "'a unity of purpose[,] a common design and understanding, or a  
22 meeting of minds in an unlawful arrangement.'" *Id.* (quoting *Monsanto*, 465 U.S. at 764).

23           Direct evidence demonstrates that a single person, Mr. Jobs: (i) was aware of the Pixar /  
24 Lucasfilm agreement and understood its anticompetitive purpose and effect, Catmull 61:13-19;  
25 195:18-21; (ii) was the CEO of both Apple and Pixar when their heads of HR confirmed a  
26 "gentleman's agreement" that is "similar to our Lucasfilm agreement," Ex. 139; (iii) personally  
27 struck an identical anti-solicitation agreement with Mr. Brin of Google, enlisting Apple Co-Lead  
28 Director Mr. Campbell to provide substantial assistance, Exs. 199, 557, 1871; (iv) three months

1 later, personally struck another identical anti-solicitation agreement with Mr. Chizen, CEO of  
2 Adobe, Ex. 223; (v) sought to enter another such agreement with Mr. Colligan, the CEO of Palm,  
3 Colligan Decl., Exs. A and B; and (vi) personally implemented and enforced these anti-  
4 solicitation agreements, Exs. 192, 277.

5 Additional direct evidence shows that another individual, Mr. Campbell: (i) was  
6 extraordinarily close to Mr. Jobs and communicated with him several times a week, was  
7 Mr. Jobs's "coach" and "[v]ery, very, very good friend," and was his neighbor in Palo Alto;  
8 (ii) was a Co-Lead Director of Apple's Board; (iii) was an intimate "advisor" to Google senior  
9 executives, "coach" to Mr. Jobs, Mr. Schmidt, and Mr. Page, and regular attendee of Google's  
10 weekly Executive Management Group meetings and Board meetings, during which Google's "Do  
11 Not Call" list was discussed; (iv) was never asked to leave a Google EMG or Board meeting  
12 because of actual or potential conflicts of interest; (v) was Chairman of Intuit's Board; (vi) had a  
13 "very friendly" relationship with Adobe's Mr. Chizen; (vii) had a "very friendly" relationship  
14 with Intel's Mr. Otellini, Campbell 111:6-13; (viii) assisted Mr. Jobs in securing an anti-  
15 solicitation agreement between Apple and Google, Ex. 199; (ix) requested and entered into an  
16 anti-solicitation agreement with Google on behalf of Intuit, Ex. 597; Campbell 28:23-29:1; and  
17 (x) advised Google executives to enter into another anti-solicitation agreement with Facebook.  
18 Ex. 667.

19 Thus, these two "[v]ery, very, very good friends" either personally entered into, or were  
20 involved with, all actual and attempted anti-solicitation agreements at issue in this case. This  
21 evidence alone would be more than sufficient to "tend[] to exclude the possibility that  
22 [Defendants] acted independently." *Citric Acid*, 191 F.3d at 1093 (quoting *Matsushita*, 475 U.S.  
23 at 588). *See also High-Tech I*, 856 F. Supp. 2d at 1117 (same, collecting cases).

24 But the evidence of coordination and collusion goes much further. Given that Defendants  
25 all entered into their anti-solicitation agreements secretly, it would be a remarkable (indeed,  
26 impossible) coincidence if these agreements arose together and operated in parallel for years,  
27 among such a tight-knit group of Northern California technology companies and senior  
28 executives, all with identical terms, without coordination and common purpose. *High-Tech I*,

1 856 F. Supp. at 1116 (it “strains credulity” that Defendants’ secret bilateral agreements could  
2 arise together without “some communication or coordination”). But this is exactly what  
3 Defendants ask the Court to accept, and to further conclude that it would be unreasonable for a  
4 jury to determine otherwise. Defendants make this request against the backdrop of their failure to  
5 provide any alternative explanation for how such a coincidence could have occurred, and  
6 admissions by their own experts that they are unaware of any similar anti-solicitation agreements,  
7 aside from those involving Defendants, ever occurring anywhere at any time. *See Barry v. Blue*  
8 *Cross of Cal.*, 805 F.2d 866 (9th Cir. 1986) (the finder of fact may infer a conspiracy from the  
9 relationship of the defendants, based on “common sense.”).

10 Opportunities for Defendants to conspire, and to learn of each other’s agreements and  
11 common purpose, were legion. Every Defendant is headquartered within 45 miles of each other.  
12 Among the non-settling Defendants, none are located more than 17 miles from each other.<sup>31</sup> The  
13 individuals who entered into the secret anti-solicitation agreements interacted and communicated  
14 with each other regularly throughout the conspiracy period. Mr. Schmidt served on Apple’s  
15 Board with Mr. Jobs and Mr. Campbell. Mr. Otellini served on Google’s Board, which Mr.  
16 Campbell attended regularly. Mr. Chizen was friendly with Mr. Campbell, and Adobe  
17 communicated continuously with Apple on a range of issues, from the 1980s to the present.  
18 Chizen Dep. 23:1-15; 79:11-20. Mr. Jobs and Mr. Otellini also communicated frequently.  
19 Otellini 81:4-82:9. Further, their anti-solicitation agreements not only had identical terms, but  
20 internal confidential emails even referred to them using the same illicit shorthand: “gentleman’s  
21 agreements.” *See, e.g.*, Ex. 137 (Pixar document referring to Pixar / Lucasfilm); Ex. 139 (Pixar  
22 document referring to Apple / Pixar); Ex. 202 (Intel document referring to Google / Intel);  
23 ADOBE\_4979 (Adobe document referring to Apple / Adobe); GOOG-HIGH-TECH-58471  
24 (Google document referring to Google / Apple); 231APPLE098782 (Apple document referring to  
25 Apple’s anti-solicitation agreements generally).

26 The evidence, viewed as a whole, at the very least tends to exclude the possibility that

27 <sup>31</sup> In fact, one may reach the headquarters of all four remaining Defendants within a single 32-  
28 minute car ride. *See* <http://www.google.com/maps> (last visited February 4, 2014) (map of 24.7  
mile drive to the corporate headquarters of Adobe, Apple, Google, and Intel).

1 Defendants acted independently. *Matsushita*, 475 U.S. at 597. Further, given that the express  
2 agreements were themselves unlawful and anticompetitive, “broader inference are permitted” to  
3 infer conspiracy. *In re Publ’n Paper*, 690 F.3d at 63.

4       **D.     Each Defendant Joined the Conspiracy and Furthered Its Purpose**

5       Defendants’ individual motions all rest upon the same improper premise: that the Court  
6 should deny Plaintiffs “the full benefit of their proof,” and instead “tightly compartmentaliz[e] the  
7 various factual components and wip[e] the slate clean after scrutiny of each.” *Cont’l Ore*, 370  
8 U.S. at 699. For the reasons explained above, the Court should reject this invitation to legal error  
9 and instead examine “the character and effect” of the alleged conspiracy “only by looking at it as  
10 a whole.” *Id.* (internal quotation marks and citations omitted).<sup>32</sup>

11       **1.     Apple**

12       Apple begins by conceding that it entered into the anti-solicitation agreements Plaintiffs  
13 allege. Apple MSJ at 1 (“Apple entered into each of the three DNCC agreements”). Apple  
14 claims, however, that its anti-solicitation agreements had “nothing to do” with suppressing the  
15 compensation and mobility of Class members. Apple MSJ at 2.

16       Using its own interrogatory answers as its only support, Apple asserts that its anti-  
17 solicitation agreement with Adobe actually began much earlier than Plaintiffs allege: “in the  
18 1980s,” and arose out of technical collaborations. Apple MSJ at 2, 6-7. The agreement was  
19 “reaffirmed” in emails between Mr. Jobs and Mr. Chizen in 2005. *Id.* (citing to Ex. 223). But  
20 Apple ignores that the only business record to which it cites is to the contrary. As Mr. Chizen  
21 explained: [REDACTED]

22 [REDACTED] Ex. 223. The status quo was  
23 intolerable to Mr. Jobs, who convinced Mr. Chizen to expand the understanding from [REDACTED]  
24 [REDACTED] in a manner identical to the deal he struck with Google’s Mr. Brin

25 \_\_\_\_\_  
26 <sup>32</sup> Defendants cite *AD/SAT v. Associated Press*, 181 F.3d 216 (2d Cir. 1999), which is not  
27 contrary to *Cont’l Ore*. There, the court rejected the plaintiff’s novel argument that a trade  
28 association’s conduct should be considered the “joint action of the association’s members,”  
thereby obviating “the need to inquire into the conspiratorial agreement” among its members. *Id.*  
at 233-34. Here, Plaintiffs rely on no such assumption of joint action and supply ample evidence  
showing each Defendant’s participation.

1 three months earlier. *Id.* Apple also ignores testimony, examined by Dr. Marx, that contradicts  
2 the idea that the Apple / Adobe anti-solicitation agreement began in the 1980s, or arose out of  
3 technical collaborations. Marx I ¶ 27 (citing Warnock 24:19-25:17).<sup>33</sup>

4 While Apple begins its argument admitting that its anti-solicitation agreements were in  
5 fact agreements, Apple then attempts to inconsistently characterize the Apple / Pixar agreement  
6 as a “unilateral practice,” Apple MSJ at 3 and 8, ignoring direct evidence to the contrary. *See,*  
7 e.g., Ex. 139. Also, the pretext Apple provides for the agreement—that it existed to address  
8 conflicts of interest with Mr. Jobs as CEO of both companies—is without basis. As defense  
9 expert Dr. Talley explained, any such conflict of interest would have been with the individual  
10 (Mr. Jobs) and not with the entire company (Apple or Pixar). Talley Dep. 198:21-200:2. Thus,  
11 the companies could have easily addressed the conflict simply by screening Mr. Jobs off from  
12 attempts to recruit Pixar employees or vice-versa. There is no evidence that this ever happened  
13 (regarding Mr. Jobs or any other similarly-situated individual, such as Mr. Campbell,  
14 Mr. Schmidt, or Mr. Otellini). In fact, Mr. Jobs did the opposite: he required Pixar to request and  
15 receive his personal permission before recruiting or hiring Apple employees. Ex. 420; McAdams  
16 Dep. 158:20-159:19.

17 Apple claims that its anti-solicitation agreement with Google was “a result of the  
18 companies’ close technical collaborations.” Apple MSJ at 9. But Apple ignores Dr. Marx’s  
19 analysis and Dr. Talley’s admissions that the contracts memorializing the collaborations make no  
20 mention of the anti-solicitation agreement, and the individuals at each company most involved in  
21 the collaborations had no idea that the anti-solicitation agreement even existed. Talley Dep.  
22 116:23-117:12; 217:16-22; Marx ¶ 6(c). Apple also claims that the Apple / Google agreement

23 <sup>33</sup> [REDACTED]

1 arose out of Mr. Schmidt's overlapping Board membership. But the agreement was struck  
2 between Mr. Jobs and Mr. Brin over a year before Mr. Schmidt joined Apple's Board in August  
3 2006. *Compare* Ex. 563 with Apple MSJ at 3.<sup>34</sup>

4 Apple also argues that it should not be held liable for the damage caused by the  
5 conspiracy because its anti-solicitation agreements were in its self-interest. Apple MSJ at 7. But  
6 it is not a defense to conspiracy that the conspiracy was in a defendant's individual self-interest.  
7 *General Motors*, 384 U.S. at 142; *Masonite*, 316 U.S. at 276. A member of a price-fixing cartel  
8 does not seek to increase the profits of its competitors; it seeks to use the cartel to increase its own  
9 profits. The same is true here. Defendants used their network of anti-solicitation agreements to  
10 suppress the compensation and mobility of their own employees. Further suppressing the  
11 compensation and mobility of each other's employees was also in each Defendant's individual  
12 self-interest, since each Defendant knew that it could suppress compensation further if its  
13 competitors also suppressed compensation and mobility of their employees.

14 Apple fails to provide a rationale for its misconduct that is not clearly contradicted by the  
15 voluminous record. Apple also ignores additional contrary evidence, such as Mr. Jobs's attempt  
16 to strike another illegal agreement with Palm's Ed Colligan, a company that had no technical  
17 collaborations with Apple or overlapping board member. *See also* Parts II, III.B, III.C, *supra*,  
18 and Parts III.D.2-4, *infra*. Apple's motion should be denied.

19           **2.        Adobe**

20           Adobe starts by contradicting Apple's version of events: the Apple / Adobe agreement,  
21 according to Adobe, occurred exactly as Plaintiffs allege. In May of 2005 (three months after the  
22 Apple / Google agreement), not in the mid-1980s. Adobe MSJ at 1 ("It is correct that Adobe

23           <sup>34</sup> The Apple official primarily responsible for Apple's relationship with Google, and who  
24 verified the statements in Apple's interrogatory responses pertaining to Google, professed  
25 ignorance of the anti-solicitation agreements and could not identify any portion of any written  
26 agreement between Apple and Google concerning recruiting or identifying individuals not to be  
recruited based on their assignment to collaborative projects. Croll 13:22-24, 69:10-70:2, 125:3-8.  
Apple's head of executive recruiting was similarly unaware of any such limitations, Bentley  
18:15-19:5, and Ms. Lambert would not say whether agreement was tied to collaborations.  
Lambert 78:6-22. Apple collaborated with Google before the agreement. Ex. 2249; Cook 60:13-  
15. Moreover, the cooperative spirit between Apple and Google such as it was fell apart during  
the pendency of the agreement, but the agreement continued. Cook 67:12-68:8; Lambert 79:14-  
80:21; Croll 136:3-137:21; Schmidt 95:24-96:21; Brin 40:22-41:2; Eustace 52:12-53:14.

1 entered into a bilateral DNCC agreement with Apple in May 2005.”).

2       Adobe’s individual motion boils down to the following argument: while Adobe entered  
3 into the precise unlawful agreement with Apple that Plaintiffs allege, and while there may have  
4 been a conspiracy to suppress employee compensation and mobility among other Defendants, that  
5 larger conspiracy did not include Adobe. As a result, Adobe argues it should have no liability to  
6 the Class. Adobe asserts that “the existence or not of other bilateral agreements was irrelevant to  
7 Adobe.” Adobe MSJ at 4. But Adobe ignores evidence that it exchanged confidential  
8 compensation information with Defendants other than Apple,<sup>35</sup> that it considered the other  
9 Defendants to be horizontal competitors for employees, Ex. 211, and that it participated in salary  
10 surveys in which other Defendant companies beyond itself and Apple participated, Ex. 308, D.  
11 Morris Dep. 177:15-178:10. Adobe also ignores that its internal documents show that individuals  
12 within Adobe, a year after the agreement began, used the same shorthand for the anti-solicitation  
13 agreements as the other Defendants: “gentleman’s agreement.” ADOBE\_4979. Adobe says  
14 nothing about Mr. Chizen’s position within the tight network of co-conspirators, including his  
15 “friendly” relationship with Mr. Campbell and his frequent communications with Mr. Jobs.  
16 Chizen Dep. 23:1-15; 79:12-20. Adobe is silent regarding the fact that other Defendants aside  
17 from Apple learned of its agreement with Apple. Ex. 2795; Flynn Dep 65:8-10; 73:23-74:5;  
18 138:22-23.

19       While Adobe contends that Plaintiffs have failed to support the “who, what, to whom,  
20 where, and when” of the alleged conspiracy, Adobe MSJ at 7, Adobe ignores that Plaintiffs have  
21 provided direct evidence of the allegations the Court has already held do exactly that. *High-*  
22 *Tech I*, 856 F. Supp. 2d at 1117 (“Plaintiffs here have ‘answered the basic questions: who, did  
23 what, to whom (or with whom), where, and when?’”) (internal quotation omitted). Adobe also  
24 tries to spin the fact that it had no board overlap with Apple as an inference against conspiracy.

25<sup>35</sup> [REDACTED]

1      Adobe MSJ at 7-8. But Adobe ignores that this is a purported *justification* put forward by its co-  
2      Defendants (all of whom ignore this contrary fact in their selective and improper dismembering  
3      of the conspiracy). The undisputed fact that the individuals involved—Mr. Chizen and Mr.  
4      Jobs—regularly held confidential communications (including those at the heart of the illegal  
5      agreement) and in-person meetings, Chizen Dep. 79:11-20; 151:11-13, provides the same  
6      opportunity for conspiracy that overlapping Board membership creates, and also puts the lie to the  
7      other Defendants' pretext of avoiding Board conflicts of interest. *High-Tech I*, 856 F. Supp. 2d at  
8      1118 (“This is precisely the reason for which Plaintiffs allege overlapping board membership  
9      here: to indicate an opportunity to conspire.”).<sup>36</sup>

10     Mr. Chizen did not simply strike a parallel deal with another senior executive. He struck  
11    it directly with Mr. Jobs himself, the architect of the conspiracy. Mr. Jobs made his views  
12    regarding anti-solicitation agreements known, and he made those views known loudly, clearly,  
13    and repeatedly. Schmidt Dep. 169:12-17; Brin Dep. 112:21-24; Catmull 195:18-21. Viewing the  
14    evidence “as a whole,” it is certainly a reasonable inference that Mr. Jobs made this same view  
15    known to Mr. Chizen, if not immediately, then certainly during the five years during which the  
16    illicit pact was in place.

17     In fact, direct evidence demonstrates that Mr. Chizen knew his pact with Mr. Jobs was not  
18    an isolated event. One month before striking the anti-solicit deal with Mr. Jobs, Ex. 223, Adobe  
19    announced that it would attempt to acquire Macromedia, a rival technology company  
20    headquartered in San Francisco, California (among other products, Macromedia created Flash

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21     36 [REDACTED]

1 player).<sup>37</sup> Well before the acquisition was finalized on December 5, 2005, [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED] Mr. Chizen understood he  
18 was joining a larger collusive effort to eliminate competition for technical talent and that is  
19 exactly what the law prohibits. Jury Instructions at B-13.

20 Adobe attempts to distance itself from the other nearly identical agreements at issue in this  
21 case by pointing to the fact that the Pixar / Lucasfilm agreement included additional unlawful  
22 terms. Adobe MSJ at 8-9. But Mr. Lucas himself explained that what mattered was what all  
23 agreements at issue in this case have in common: [REDACTED]

24 [REDACTED] Lucas 92:12-13. Adobe also dismisses the fact that its  
25 agreement was identical to all of the other anti-solicitation agreements by remarking that the  
26 terms of these agreements “are not so complicated, detailed or unusual as to suggest a

27 \_\_\_\_\_  
28 <sup>37</sup> <http://www.adobe.com/aboutadobe/invrelations/adobeandmacromedia.html> (last visited  
January 31, 2014).

1 conspiracy,” Adobe MSJ at 9, despite the fact that none of Defendants’ four experts could provide  
2 a single example of another such agreement that did not involve a Defendant.<sup>38</sup> See also Parts II,  
3 III.B, III.C, III.D.1, *supra*.

4 Adobe’s motion should be denied.

5       **3.       Google**

6       Like the others, Google readily concedes the three unlawful bilateral agreements to which  
7 it was a direct party (despite its own senior executives denying, incredulously, that any of these  
8 agreements occurred). Google MSJ at 1. Google also admits that it grew rapidly in the lead-up to  
9 the conspiracy, and that just as it joined the conspiracy, Google was expanding its recruiters from  
10 “about 130 in 2005 to over 800 by mid-2007.” *Id.* at 3. This competitive threat is exactly what  
11 prompted the expansion of the conspiracy to include Google.

12       Google asserts a variety of facts it claims are “undisputed,” *id.*, when the evidence is to  
13 the contrary. Google claims there is no evidence it knew that its three bilateral agreements were  
14 part of a larger effort to suppress compensation and employee mobility. *Id.* at 1-2. Google  
15 ignores that these agreements alone (along with its attempted agreement with Facebook)  
16 systematically suppressed employee compensation and mobility across four companies: Apple,  
17 Intel, Intuit, and Google. The evidence demonstrates that none of these agreements were one-offs  
18 or isolated, but instead spread through the tight network of senior executives who all knew about  
19 each other’s agreements: Bill Campbell (Chairman of Intuit, Co-Lead Director of Apple,  
20 “advisor” and “coach” to Steve Jobs and Eric Schmidt; Eric Schmidt and other members of

---

21       <sup>38</sup> [REDACTED]

1 Google's Executives Management Group, including Sergey Brin and Larry Page; and Paul  
2 Otellini, Intel CEO and Google Director). The evidence also shows that Mr. Campbell worked  
3 with Google executives to expand the effort to include Facebook. Ex. 667; Campbell 142:17-20.  
4 Thus Google, Intel, and Intuit all understood they were part of a concerted effort to suppress  
5 compensation and mobility beyond their own companies.

6 Further, the evidence certainly provides a reasonable inference that these companies  
7 understood that the Google / Apple agreement was not the only anti-solicit agreement Apple had.  
8 As Mr. Schmidt himself explained: given his personal knowledge of Mr. Jobs's views on  
9 employee recruiting, it is [REDACTED] that Mr. Jobs [REDACTED]  
10 [REDACTED] Schmidt 169:4-170:20. Indeed, [REDACTED]  
11 [REDACTED], and at least one of  
12 those recruiters attended approximately thirty meetings of Google's Executive Management  
13 Group, a team including Mr. Schmidt, Mr. Page, Mr. Brin, and Mr. Campbell. Flynn Dep. at  
14 56:6-25. Google "may become a member of a conspiracy without full knowledge of all the  
15 details of the conspiracy, the identity of all its members, or the parts they played." Jury  
16 Instructions at B-13. "Knowledge of the essential nature of the plan is enough," *id.*, and Google  
17 understood the essential nature of the network of "gentleman's agreements" to which it agreed  
18 and promulgated.

19 Google also claims it had "no reason to believe" that it had anything to gain from anti-  
20 solicitation agreements among other companies that suppressed the compensation and mobility of  
21 non-Google employees. Google MSJ at 2, 9. But as Google's own contemporaneous business  
22 records show, in October 2008, Google exchanged confidential compensation information with its  
23 labor competitors, including Apple, Intel, and Adobe. Ex. 621 at 2-3. This and other business  
24 records confirm the common sense conclusion of Plaintiffs' experts: that all members of the  
25 conspiracy stood to benefit (and in fact benefited) from a reduction in competition among  
26 horizontal competitors. *See also* Parts II, III.C.2, *supra*. That Google also benefited from its own  
27 bilateral agreements, independent from and in addition to the others, Google MSJ at 9, is no  
28 defense to conspiracy. *General Motors*, 384 U.S. at 142; *Masonite*, 316 U.S. at 276.

1           Google contends that its decision to create a “do not call” list was an internal one, and that  
2 it “was not difficult” to add Apple to that list because of collaborations with Apple. Google MSJ  
3 at 3-4. In fact, Google’s “do not call” list—which, through no coincidence, happened to operate  
4 identically to Apple’s own “do not call” list, Flynn Dep. 110:18-112:23—was created to codify  
5 its agreement with Mr. Jobs, after Mr. Jobs had discussions with Mr. Brin and used Mr. Campbell  
6 to apply additional pressure to Mr. Schmidt. Ex. 199; *see also* Schmidt 60:21-22 [REDACTED]

7 [REDACTED]

8 [REDACTED] Google also attempts to play off its anti-solicitation agreements as simply a  
9 reasonable part of its technical collaborations. Google MSJ at 3-5. But, as Dr. Marx explains,  
10 and as Google’s own Dr. Talley admits, the contracts memorializing these collaborations make no  
11 mention of the anti-solicitation agreements, and the individuals directly responsible for the  
12 collaborations had no idea the unlawful arrangements even existed.<sup>39</sup> *Id.* ¶¶ 28, 30.a; Marx  
13 Rebuttal ¶ 31; Talley Dep. 116:23-117:12; 217:16-22. *See also* Parts II, III.B, III.C, III.D.1-2,  
14 *supra*, and Part III.D.4, *infra*.

15 Google’s motion should be denied.

16           **4. Intel**

17 Intel follows the same strategy as Adobe: while Intel concedes it entered into the  
18 agreement with Google as Plaintiffs allege, and while a larger understanding to suppress  
19 employee compensation and mobility may have existed among other Defendants, Intel did not  
20 join it.

21 According to Intel, “Neither the existence of [its agreement with Google] nor the  
22 circumstances surrounding it do anything to establish that Intel joined” a common understanding  
23 to suppress Class compensation and mobility. Intel MSJ at 2. But Intel ignores that “the  
24 circumstances surrounding” its anti-solicitation agreement with Google was Google’s response to  
25 Mr. Jobs’s and Mr. Campbell’s successful efforts to persuade Google to enter into an identical  
26 agreement with Apple. Mr. Otellini, a member of Google’s Board, was included in these  
27 discussions. Brin 74:15 [REDACTED] Schmidt 126:10-11 [REDACTED]

28 <sup>39</sup> *See also* Kordestani Dep. 88:20-89:10; Eustace Dep. 46:4-19.

1 [REDACTED] Rosenberg 85:15-24. Thus, Mr. Otellini knew what  
2 Google's senior executives and Mr. Campbell knew, which was that they were all joining an  
3 effort to eliminate competition with Mr. Jobs, an individual who [REDACTED] expressed his view  
4 that [REDACTED] Schmidt  
5 169:12-22. *See also* Brin 112:21-24; Catmull 195:18-21. Mr. Otellini also participated in  
6 discussions with Mr. Campbell and others at Google about the threat that Facebook posed,  
7 discussions that led to Mr. Campbell instructing Google executives to extend the conspiracy to  
8 Facebook. Exs. 471, 667; Campbell 142:17-20.

9 Mr. Otellini's testimony to the contrary is not credible. [REDACTED]

10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED] In this regard, he is similar to other senior executives in this action who resorted to  
15 obfuscation, lack of memory, and absurdity when faced with direct evidence of their wrongdoing.  
16 *See, e.g.*, Brin 113:20-115:1 [REDACTED]  
17 [REDACTED]  
18 [REDACTED] compare with T. Cook 76:18-21 [REDACTED]  
19 [REDACTED] Intel could not even persuade its own retained expert,  
20 Dr. Snyder, that [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED] (emphasis added).

24 Intel also ignores evidence that it considered other Defendants to be horizontal  
25 competitors for employees and shared confidential compensation information with them,<sup>40</sup> used

26 <sup>40</sup> Ex. 621 at 2; Ex. 463 (Otellini email circulating at Intel a summary he "lifted from Google" of  
27 bonus programs at companies including Apple and Intel); Ex. 2037 (internal Intel email re  
"benchmarking meeting" that included Adobe and Intuit); Ex. 2038 (internal Intel email from  
28 Matthew Pera to compensation specialist Danny McKell re option grants at companies including  
Adobe); Ex. 2040 (internal Intel email re Google transferable stock options proposal); Otellini

Footnote continued on next page

1 the same shorthand for the agreements as all the other Defendants, e.g., Ex. 388 [REDACTED]  
2 [REDACTED] and that Mr. Otellini spoke and met regularly with Mr. Jobs,  
3 Otellini 81:4-82:9, and was “very friendly” with Mr. Campbell, Campbell 111:6-13.

4 Intel also asserts that “the principal if not only purpose” of its secret agreement with  
5 Google was to “facilitate” technical collaborations. Intel MSJ at 4 n.4. However, both Intel and  
6 Google’s experts admitted that the contracts memorializing these collaborations make no mention  
7 of the anti-solicitation agreement. Talley Dep. 116:23-117:12; 217:16-22. Further, the  
8 contemporaneous business records show that the individuals involved in the collaborations were  
9 not made aware of the [REDACTED] Ex. 388 [REDACTED]  
10 [REDACTED]

11 [REDACTED] Ex. 387 (Mr. Otellini forwarding confirmation of the anti-solicit deal with  
12 Mr. Schmidt to Intel’s head of HR: [REDACTED]<sup>41</sup> See also Parts II, III.B, III.C, III.D.1-  
13 3, *supra*.

14 Intel’s motion should be denied.

15 **IV. DEFENDANTS’ JOINT MOTION FOR SUMMARY JUDGMENT BASED ON**  
**THEIR MOTION TO EXCLUDE TESTIMONY OF DR. LEAMER FAILS**

17 Defendants’ Joint Motion for Summary Judgment Based on their Motion to Exclude  
18 Testimony of Dr. Leamer fails for the reasons explained in Plaintiffs’ Opposition to Defendants’  
19 Motion to Strike Reply Report of Edward Leamer, Ph.D. and Plaintiffs’ Opposition to  
20 Defendants’ Motion to Exclude Expert Testimony of Edward E. Leamer, Ph.D., filed herewith.

21 Defendants also assert that, apart from Dr. Leamer’s damages estimate, “plaintiffs have no  
22 evidence of class-wide impact or damages . . . .” Joint MSJ at 1. Defendants ignore the Court’s  
23 prior orders summarizing the substantial documentary and testimonial evidence regarding impact

24 *Footnote continued from previous page*  
25:4-16.

25 <sup>41</sup> Intel and Google collaborated before the conspiracy. Otellini 84:3-20, 195:24-196:24. During  
the conspiracy. [REDACTED]

1 and damages. *High-Tech II*, 289 F.R.D. at 565-574; *High-Tech III*, 2013 U.S. Dist. LEXIS  
2 153752, at \*68-110, 139-167. “Plaintiffs’ documentary evidence provides substantial further  
3 support for Plaintiffs’ method of proving [common] impact. Indeed, at trial, the Court predicts  
4 that this evidence is likely to be among the most persuasive to a jury as it illustrates and confirms  
5 many of the actual dynamics at play within Defendants’ firms.” *High-Tech III*, 2013 U.S. Dist.  
6 LEXIS 153752, at \*141. Defendants also ignore Dr. Leamer’s analyses apart from his damages  
7 estimate, and the additional expert work provided by Drs. Hallock, Manning, and Marx. *See*  
8 Part II, *supra*. Defendants’ joint motion should be denied.

9 **V. CONCLUSION**

10 For the aforementioned reasons, the Court should deny Defendants’ joint and individual  
11 motions for summary judgment.

12 Dated: February 6, 2014                    LIEFF CABRASER HEIMANN & BERNSTEIN, LLP  
13

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